

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GEORGE A. LUCAS & SONS,	)	Case Nos. 81-CE-121-D	
	)	81-CE-129-D	81-CE-231-D
Respondent,	)	81-CE-154-D	81-CE-232-D
	)	81-CE-164-D	81-CE-233-D
and	)	81-CE-182-D	81-CE-246-D
	)	81-CE-209-D	82-CE-6-D
UNITED FARM WORKERS OF	)	81-CE-211-D	82-CE-10-D
AMERICA, AFL-CIO,)		
	)	10 ALRB No. 33	
Charging Party.)		

DECISION AND ORDER

On February 25, 1983, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision. Thereafter, Respondent George A. Lucas & Sons, General Counsel, and Charging Party, the United Farm Workers of America, AFL-CIO (UFW), all filed timely exceptions to the ALJ's Decision with supporting briefs, and all filed reply briefs.

Pursuant to the provisions of section 1146 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ except as modified herein.

ALJ's Dismissal of Allegations and General Counsel's Interim Appeal

At the close of General Counsel's case-in-chief in

the hearing on this matter, Respondent moved for dismissal of the entire First Amended Complaint (Complaint) on the grounds that the General Counsel had failed to establish a prima facie case as to any of the alleged violations. The ALJ granted Respondent's motion as to one named alleged discriminatee in Paragraph 5 of the Complaint and as to Paragraphs 7, 8, 10, 14, and 16 in their entirety. General Counsel filed a Request for Review (Interim Appeal) pursuant to Title 8, California Administrative Code, section 20240(f).^{1/} Respondent filed an Opposition to General Counsel's Request for Review, and the Charging Party filed a Response to Respondent's Opposition. By an Order dated July 30, 1982, this Board denied General Counsel's Request for Review, without prejudice, stating that the ALJ in his Decision should set forth his reasons for granting Respondent's motion as to the above-enumerated paragraphs of the Complaint and that those reasons could be challenged by General Counsel and the UFW in their exceptions to the ALJ's Decision.

Respondent then filed a Motion for Reconsideration, arguing that it was improper for this Board to deny General Counsel's Request for Review without prejudice and to invite General Counsel and the Charging Party to argue about the ALJ's

^{1/} Title 8, California Administrative Code, section 20240(f) provides in relevant part as follows:

Rulings on motions shall not be appealable, except at the discretion of the Board. However, a ruling which dismisses a complaint in its entirety shall be reviewable.

dismissal of those parts of the Complaint again in their exceptions. As to the Charging Party, Respondent argued that by not filing a Request for Review pursuant to Regulation section 20240(f) the Charging Party lost what right it had to challenge the ALJ's action. As to the General Counsel, Respondent argued that the Board's denial of the Request for Review should be final, with no opportunity provided for challenging the ALJ's ruling a second time. This Board denied Respondent's Motion for Reconsideration. In its Brief Answering Charging Party's and General Counsel's Exceptions to the ALJ's Decision, Respondent repeats its argument that the General Counsel and the Charging Party should not be permitted to challenge the ALJ's ruling again.

Respondent's position lacks merit. Regulation section 20282(a) provides in relevant part that "any party may file with the executive secretary...exceptions to the decision [of the ALJ] or any other part of the proceeding...." This gives all parties a right to file such exceptions. The language of Regulation section 20240(f), by contrast, provides only that an interim appeal on a request for review of an ALJ's ruling is not a matter of right but rather lies within the discretion of the Board. The relevant part of that section provides: "Rulings on motions shall not be appealable, except at the discretion of the Board." Neither Regulation section 20240(f) nor Regulation section 20282(a), nor any other part of our Regulations, contains any provision making a request for review (interim appeal) and the filing of exceptions to the ALJ's decision or rulings mutually exclusive avenues for parties to

Board proceedings to pursue. That is, our regulations do not preclude a party whose request for review pursuant to Regulation section 20242(f) is denied from raising the same issue in exceptions filed pursuant to Regulation section 20282(a). Indeed, denial of a request for review by the Board is not a determination on the merits with respect to the issue(s) raised in the request. It may be, rather, a choice by the Board not to decide such issue(s) at that time. Moreover, in many cases, adoption of the position advocated by Respondent would deprive the Board of the valuable opportunity to review an ALJ's ruling in the context of a more complete record, including a decision addressing all the issues in the case. Respondent's position gives too little importance to the complete de novo review of the issues which are brought to the Board by way of exceptions to an ALJ decision. Requests for review (interim appeals) must necessarily be acted upon speedily, in order that hearings may go forward. In our consideration of exceptions to ALJ decisions, on the other hand, we are able to undertake a thorough and comprehensive review of all the issues and all the evidence in the case with the benefit of a considered analysis by the ALJ.

However, having considered the exceptions taken by General Counsel and the Charging Party to the ALJ's dismissal of Paragraphs 7, 8, 14, and 16, we find that those exceptions are lacking in merit. As the ALJ states on page 6 of his Decision, in footnote 7, General Counsel failed to show that the alleged discriminatee named in Paragraph 16 engaged in organizing activities protected by the Act, and also failed to

show, as regards the employees named in Paragraphs 7, 8, and 14, that there was any causal connection between such activity on their part and discriminatory treatment of them by Respondent.

As to the ALJ's dismissal of Paragraph 10, we find merit in the exception taken by General Counsel and the Charging Party, to the following extent. Paragraph 10 alleged that on or about September 6, 1981, Respondent changed the terms and conditions of Francisco Gutierrez' employment because of his support for and activities on behalf of the UFW.

Gutierrez was one of about six steady employees who irrigated and did odd jobs, as needed, for Respondent. Although other steadies would occasionally be assigned to pick grapes in the harvest, Gutierrez begged off from such an assignment early in his career with Respondent, which apparently began in 1976, on grounds that he did not know how to do it. He was not assigned such work thereafter until the 1981 harvest, which began less than two months after a victory for the UFW in a representation election among Respondent's agricultural employees. In the pre-election campaign, Gutierrez testified, he argued with his foreman, Jose Jiminez, in favor of representation by the UFW. In the harvest Jiminez told Gutierrez either to pick or "go home and rest." Gutierrez interpreted this to mean that he would be laid off if he didn't undertake the picking. Gutierrez testified that during the twenty or so days that he did do the picking he occasionally saw other employees doing some of the odd jobs which had previously been assigned to him, such as cleaning and moving toilets, and

stapling, repairing, and pulling out vines. Gutierrez also testified that all the other steadies also picked during the harvest.

The ALJ dismissed this allegation because Gutierrez had been treated no differently than any other steadies. The ALJ did not discuss whether the assignment to pick constituted a discriminatory change from Respondent's regular past treatment of Gutierrez. The UFW's exception to the ALJ's ruling is based on the change from past practice, not on disparate treatment from the other steadies.

It is well settled that discrimination may be established not only by showing that an employee has been treated differently from other employees, but also that an employee has been treated differently from established past treatment she or he had received. (Dessert Seed Company (1983) 9 ALRB No. 72; Steak-Mate, Inc. (1983) 9 ALRB No. 11.) In the present instance it appears that shortly after the UFW's election victory Gutierrez began to be treated differently with respect to work assignments than he had been for several prior years, and that the difference was unfavorable to him. The surrounding circumstances suggest that Respondent's motive for the change might have been related to Gutierrez' support for the UFW. It was error, therefore, for the ALJ to dismiss this allegation; a prima facie case had been made, and the burden of proof had shifted to Respondent to show that the change was not based on discriminatory motives.

Despite our finding that the exception taken by the General Counsel and the UFW is meritorious, we decline to remand

the case for further evidentiary proceedings on this issue. No allegation has been made that Gutierrez suffered any financial loss due to his changed work assignment, and the change lasted for only some twenty work days. We find that the purposes of the Act would not be promoted by reopening the hearing so that further evidence could be received on this matter.

General Counsel and the UFW except to the ALJ's dismissal of Paragraph 5 of the Complaint, which alleges that Respondent through foreman Eduardo "Lalo" Cardenas discriminatorily laid off Jose Luis Madrigal and Roberto Duran because of their support for and activities on behalf of the UFW. The evidence established that both Duran and Madrigal were known supporters of the UFW. Shortly before laying off his crew at the end of the pre-harvest season, Cardenas selected some members of his regular crew for special work on two skeleton crews replanting vines at fields located a substantial distance from the fields where the regular crew was working. The skeleton crews kept working for about one month after the regular crew's lay-off. Neither Madrigal nor Duran received the benefit of the additional work afforded skeleton crew members although some employees with less seniority on the Cardenas crew apparently did; their non-participation on the skeleton crew is the basis of the allegation in Paragraph 5 of the Complaint that Respondent violated section 1153(c) and (a).

The exception lacks merit. The evidence indicates that Madrigal was originally selected by Cardenas for skeleton crew work but was dropped when he missed the first day of work

for the skeleton crew to which he had been assigned. As to Duran, Respondent's position is that there could not have been any discrimination in Cardenas' failure to select Duran for a skeleton crew because at the time of the selection Cardenas could not have known whether the skeleton crews would continue to work after the regular crew was laid off. Decisions about what jobs such skeleton crews should do, and therefore how long they would remain working, were made by supervisors or the ranch superintendent, not by crew foremen. The record supports Respondent's position inasmuch as General Counsel failed to establish what expectation Cardenas had (or reasonably should have had) about the duration of the skeleton crews' employment at the time he selected employees for them. The absence of evidence that Cardenas anticipated, or reasonably should have anticipated, that the skeleton crews would remain working beyond the layoff date for the regular crew fatally undercuts the allegation that his failure to select Duran for the crew was discriminatory. That allegation is therefore dismissed.

Other Exceptions

Respondent excepts to the ALJ's finding that Respondent discriminatorily refused to rehire Juan Juarez and Samuel Viramontes in July 1981. This exception has merit.

Paragraph 6 of the Complaint alleged that Respondent violated section 1153(c) and (a) of the Act by discharging Juarez and Viramontes because of their support for and activities on behalf of the UFW. The ALJ found that General Counsel failed to present any evidence of a causal connection between the

discharges of these employees and their prior activities in support of the UFW. The ALJ found, however, that Respondent violated section 1153(c) and, derivatively, section 1153(a), by failing to rehire the two dischargees upon their application for rehire while rehiring a third employee discharged with them. The ALJ also found that the refusal to rehire was closely related to the discharge alleged in the Complaint and was fully and fairly litigated at the hearing.

We uphold the ALJ's finding that the General Counsel failed to establish that support for the UFW was a cause of Respondent discharging Juarez and Viramontes. We reject, however, his finding that Respondent's failure to rehire them was discriminatory. The evidence indicates that there were nondiscriminatory reasons why Respondent rehired Pedro Mendez while not rehiring Juarez or Viramontes. Crew leadman Victor Jiminez whom the three had harassed and insulted told supervisor Jose Becerra that Mendez had been less hostile and troublesome than Juarez and Viramontes. Moreover, Juarez and Viramontes reacted contemptuously when Becerra told them they could be rehired only if they discussed it with Victor Jiminez, while Mendez on his own initiative had sought and received Jiminez' support for his request to be rehired. The failure of Juarez and Viramontes to demonstrate any improvement in their attitude toward Victor Jiminez justified Becerra's decision not to offer them reemployment. This allegation is therefore dismissed.

No exceptions having been filed to the ALJ's finding that Respondent violated section 1153(a) and (c) by

discriminatorily discharging Gilberto and Catalina Baez, we uphold that finding.

General Counsel and Charging Party except to the ALJ's dismissal of Paragraph 9 of the Complaint, which alleged that Respondent violated section 1153(a) and (c) by discriminatorily failing to rehire Alma, Petra, and Ricardo Fuentes during the 1981 harvest. This exception lacks merit. The ALJ's dismissal of this allegation rested entirely on demeanor-based credibility resolutions he made against the alleged discriminatees and in favor of their crew foreman Ernesto Camacho. To the extent that an ALJ's credibility resolutions are based upon demeanor of the witnesses, they will not be disturbed unless a clear preponderance of the relevant evidence demonstrates that such resolutions are incorrect. (Adam Dairy dba Rancho dos Rios (1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1521].) We have reviewed the evidence and find the ALJ's resolutions of witness credibility to be supported by the record viewed as a whole.

Based on our crediting Camacho's testimony on the relevant issues, we find that the evidence General Counsel produced is insufficient to establish that Camacho either discriminatorily failed to inform the Fuentes when his crew would begin working in the harvest or discriminatorily failed to notify them of opportunities for rehire as his crew expanded during the harvest. Respondent's rehiring system requires former employees seeking to be rehired sometime after a season has begun to make application on a day when hiring is taking place. Foremen

are under no obligation to telephone or otherwise get word to such employees about exactly when they should present themselves; the responsibility to present themselves at the right time is entirely on the applicants. General Counsel failed to establish that the Fuentes made application on the dates Camacho enlarged his crew or that Camacho maintained a regular practice of calling former crew members to tell them when to report for rehire during the course of a season. Accordingly, this allegation is dismissed.

The Charging Party excepts to the ALJ's refusal to order Respondent's counsel to pay one day's legal fees for Charging Party's legal representative as compensation for time wasted as a result of Respondent's counsel's nonattendance at one day's session of the hearing. This exception lacks merit. Without repeating the detailed discussions of our statutory powers to make awards of attorney's fees which majority, concurring and dissenting opinions set forth in Sam Andrews' Sons (1984) 10 ALRB No. 11; V. B. Zaninovich & Sons (1982) 8 ALRB No. 71; Neuman Seed Company (1981) 7 ALRB No. 35; and Western Conference of Teamsters (1977) 3 ALRB No. 57, we find that the Act does not empower this Board to order any person or entity other than an agricultural employer or a labor organization to pay such fees. Respondent's counsel obviously does not fit in either of those categories. Accordingly, this exception is dismissed.

Respondent excepts to that provision of the ALJ's recommended remedial order which calls for interest on backpay for which Respondent is liable to be computed in accordance with

our Decision in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 affirmed in relevant part Sandrini Brothers v. ALRB (June 1, 1984) 5 Civil 75333, __ Cal.App.3d __ [84 Daily Journal D.A.R. 2030]. In our Decision there to follow the National Labor Relations Board's holding in Florida Steel Corporation (1977) 231 NLRB 651 [96 LRRM 1070] as applicable precedent within the meaning of section 114-8 of the Act, we considered and rejected all arguments, constitutional, statutory and equitable, which Respondent here now raises. Our view of the issues has not changed. We therefore dismiss this exception.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent, George Lucas & Sons, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee for engaging in union activity or other protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer to Gilberto Baez and Catalina Baez immediate and full reinstatement to his and her former or substantially equivalent position, without prejudice to his and

12.

her seniority or other employment rights or privileges.

(b) Make whole Gilberto Baez and Catalina Baez for all losses of pay and other economic losses they have suffered as a result of Respondent's unlawful discharges, the makewhole amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from September 24, 1981 to September 24, 1982.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period(s) and place(s) of posting to be determined

by the Regional Director and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice and their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for worktime lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request until full compliance is achieved. Dated: July 16, 1984

JOHN P. MCCARTHY, Acting Chairman

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint which alleged that we, George Lucas & Sons, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging two employees because of their support for the United Farmworkers of America, AFL-CIO (UFW). The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT discharge or otherwise discriminate against any employee because he or she has joined or supported the UFW or any other labor organization or has exercised any other rights described above.

WE WILL reinstate Gilberto Baez and Catalina Baez to their former or substantially equivalent jobs and we will reimburse them for all losses of pay and other economic losses they have sustained as a result of our discriminatory acts against them, plus interest.

Dated:

GEORGE A. LUCAS & SONS

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California, 93215. The telephone number is (805) 725-5770.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

George A. Lucas & Sons
UFW

10 ALRB No. 33
Case No. 81-CE-121-D, et. al.

ALJ DECISION

The ALJ found that Respondent violated sections 1153(a) and (c) by discharging four employees in retaliation for their support of the United Farm Workers of America, AFL-CIO. All other allegations in the Complaint were dismissed by the ALJ, including several which he dismissed at the close of General Counsel's case-in-chief, finding that General Counsel had not established a prima facie case that Respondent violated the Labor Code by the conduct alleged.

BOARD DECISION

The Board affirmed the ALJ's rulings, findings and conclusions with modifications and issued a modified version of the ALJ's recommended Order. Specifically, the Board found that Respondent did not violate the Labor Code by discharging two of the employees as to whom the ALJ had found a violation. The Board found that the ALJ erred in dismissing the allegation of a discriminatory change in working conditions in one paragraph of the Complaint, in that General Counsel had established a prima facie case with respect to that alleged discriminatee. The Board did not remand for the taking of additional evidence on this matter, however, as it found that if a violation did occur it was de minimis in its nature and effects.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:)	Case No.	81-CE-121-D
)		81-CE-129-D
GEORGE A. LUCAS & SONS,)		81-CE-154-D
)		81-CE-164-D
Respondent,)		81-CE-182-D
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and)		81-CE-211-D
)		81-CE-231-D
UNITED FARM WORKERS OF)		81-CE-232-D
AMERICA, AFL-CIO,)		81-CE-233-D
	)		81-CE-246-D
Charging Party.	)		82-CE-6-D
	)		82-CE-10-D

Appearances:

Nicholas F. Reyes, Esq.,
for the General Counsel;

Paul J. Coady, Esq., of
Seyfarth, Shaw, Fairweather & Geraldson
for the Respondent;

Tomas Gonzales for the
United Farm Workers of America, AFL-CIO,
Charging Party.

Before: Matthew Goldberg,
Administrative Law Officer

DECISION OF THE ADMINISTRATIVE LAW OFFICER

I. STATEMENT OF THE CASE

Commencing July 1, 1981,^{1/} the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union") filed a series of charges against George A. Lucas & Sons (hereafter referred to as "respondent" or the "company") alleging various violations of Sections 1153(a) and (c) of the Act. The dates the charges were filed, as well as the respective dates when they were served on respondent, are listed below:

<u>Charge Number</u>	<u>Date Filed</u>	<u>Date Served</u>
81-CE-121-D	7/1	7/1
81-CE-129-D	7/9	7/9
81-CE-154-D	8/4	8/4
81-CE-164-D	8/14	8/14
81-CE-182-D 2/	8/28	8/28
81-CE-209-D	9/14	9/11
81-CE-211-D	9/14	9/14
81-CE-231-D	10/1	10/1
81-CE-232-D	10/1	10/1
81-CE-233-D	10/1	10/1
81-CE-246-D	10/21	8/7
82-CE-6-D	1/14/82	1/14/82
82-CE-10-D	1/20/82	1/22/82

On December 28, the General Counsel for the Agricultural Labor Relations Board caused to be issued a consolidated complaint based on all of the aforementioned charges save the last two. These two charges were incorporated into a subsequent "First Amended Consolidated Complaint" dated March 17, 1982. Respondent, having been duly served with both complaints and notices of hearing,

1. All dates refer to 1981 unless otherwise noted.

2. This charge was actually filed by employee Petra Fuentes, who became named as one of the alleged discriminatees.

timely^{3/} filed an answer in which it denied the commission of any unfair labor practices.

A hearing before me was held in the matter beginning on March 31, 1982, and proceeded over the course of twenty hearing days until it closed on May 5, 1982. All parties appeared through their respective representatives, and were given full opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to submit oral arguments and briefs in support of their respective positions.

From the entire record in this case, including my observations of the demeanor of each witness as he/she testified, and having read and considered the briefs submitted to me since the close of the hearing, I make the following:

II. FINDINGS OF FACT

A. Jurisdiction

1. Respondent is and was, at all times material, an agricultural employer within the meaning of section 1140.4(c) of the Act;

2. The Union is and was, at all times material, a labor organization within the meaning of section 1140.4(f) of the Act.^{4/}

3. The company's first pleading was filed on January 11, 1982, in response to the original complaint herein. Subsequent amendments to that complaint were deemed denied pursuant to Regulation Section 20230.

4. The jurisdictional facts were admitted by respondent in its answer.

B. The Unfair Labor Practices Alleged

1. Introduction

The respondent is a partnership doing business in Kern and Tulare counties in California. It is engaged principally in the cultivation and harvesting of table and wine grapes. Operations are compartmentalized into three major employment periods or seasons during each cultural year, denominated by the parties as: pruning and tying; pre-harvest (which includes tasks such as hoeing, suckering, planting, pulling laterals, thinning, tipping, girdling, pulling leaves and canes); and harvest. Maximum or peak employment is achieved during the harvest season, which customarily runs from late July or early August until November.

On June 2, 1981, due to a Petition for Certification filed by the Union in case number 81-RC-3-D, a representation election was conducted among respondent's agricultural employees. The results of the election, certified by the Board in 8 ALRB No. 61 (1982), were, as revealed by the tally of ballots: Union: 219; no union: 150; unresolved challenged ballots: 24; void ballots: 7. General Counsel argued that the various discharges and refusals to re-hire alleged in this case as violations of the Act involved individuals or groups of workers who were instrumental in obtaining a victory for the Union in the election: respondent's conduct was thus to be perceived as an attempt to weaken support for the Union by ridding the company of some of its more vocal adherents.

Respondent is no stranger to proceedings involving this Board. Its anti-Union attitude is well-documented. In three separate cases, it has been found to have engaged in conduct

violative of the Act.^{5/} Pursuant to General Counsel's request that administrative notice be taken of those decisions, and under the rule announced in Sunnyside Nurseries (1978) 4 ALRB No. 88, it is determined that respondent's animus towards the Union, as an element of General Counsel's proof herein, is clearly established. (See also, e.g., Best Products Co., Inc. (1978) 236 NLRB 1024; Wolverine World Wide (1978) 243 NLRB No. 72.)

In 4 ALRB No. 86, respondent was found to have unlawfully denied access to Union organizers, unlawfully interrogated Union sympathizers, and given impermissible assistance to a labor organization rivaling the Union. In 5 ALRB No. 62, respondent was found to have violated sections 1153(a) and (c) of the Act by interrogating employees and by refusing to re-hire certain Union adherents. Violations of sections 1153(a) and (d) were found in 7 ALRB No. 47, where respondent discharged two employees and refused to re-hire Petra, Alma and Ricardo Fuentes.^{6/} Since these same three individuals were alleged to have again been refused rehire in the instant case, the particulars of the prior situation will be recounted in greater detail infra.

5. Respondent has also been involved in a fourth case before the Board, 3 ALRB No. 5. However, that case was a representation matter arising from an election held on September 5, 1975, and essentially concerned the Board's determination of the status of certain challenged ballots.

6. The 1153(d) violation was based on a finding that the Fuentes were not hired during the 1979 harvest because Petra had testified on behalf of the General Counsel in 5 ALRB No. 62.

Before considering each of the allegations which were not dismissed^{7/} pursuant to respondent's motion at the close of General

7. In the First Amended Consolidated Complaint, Paragraphs 7, 8, 10, 14, 16, and an individual named in Paragraph 5 as a discriminatee were dismissed at the close of General Counsel's proof for lack of establishing, in each instance, a prima facie case. Under Lawrence Scarrone (1981) 7 ALRB No. 13, a prima facie case of unlawful discrimination consists of proof, by a preponderance of the evidence, that an employee or group of employees had engaged in protected, concerted activities; that the employer had knowledge or believed that the employee or group had participated in these activities; and that the employee or group was discharged or otherwise discriminated against because of such participation, i.e., there was a causal connection between the participation and the decision regarding employment status.

In the instance of Paragraph 16 and a portion of Paragraph 5, there was no showing that the individuals involved participated in Union activities and/or that the respondent had knowledge of any such participation. With the remaining allegations, no "causal connection" between Union activity and change in work status was shown, principally because it was not demonstrated that the personnel action taken in regard to the particular individuals was in any manner disparate or discriminatory. (See Royal Packing Co. (1982) 8 ALRB No. 48; Bruce Church, Inc. (1982) 8 ALRB No. 81.)

Specifically, the discharged worker named in Paragraph 7, was, by his own admission, insubordinate. No evidence was presented that similar behavior was condoned by the respondent. The individual named as a discriminatee in Paragraph 8 reported late for the harvest and was, after a number of work days had elapsed, put to work in a different crew than that in which he had previously been employed. No evidence was presented that anyone had been hired in his original crew, i.e., that work was "available," in the period when he allegedly was "refused" rehire. In Paragraph 10, an irrigator alleged to have been the victim of discrimination was assigned to intermittent picking responsibilities during the harvest, as were all the other employees in his job classification. While he had never been asked to pick in previous years, he, like all the other irrigators, was given the choice of continuing to work or placing himself on voluntary layoff. He chose the former. In paragraph 14, General Counsel was unable to prove that the alleged discriminatee notified the company of a three-day absence. Pursuant to company policy, he was placed on layoff status. He was given the opportunity to rectify the situation and reobtain his job, but neglected to do so. There was no showing that he was treated any differently from employees who similarly had absented themselves without notifying the respondent.

Counsel's case-in-chief, it is necessary to detail certain of respondent's personnel and seniority policies in order to provide a framework for examining the personnel actions taken in regard to each of the alleged discriminatees. As concerns seniority, the parties stipulated:

Seniority is not measured by an employee's original date of hire. Instead, an employee has a preferential right to employment in a viticultural operation if, one, he has worked in a prior operation until such time as he is laid off, and two, appears for work at a time when his foreman needs employees.

An employee, however, only has a preferential right to reemployment in his own crew. Thus for example, an employee in the [X] crew who satisfies the foregoing conditions would only have a preferential right to reemployment in the [X] crew and not in any of the other crews.

The Company also has a practice of hiring three outside crews during the harvest These crews work exclusively during the harvest season.

To be permitted to work in the harvest it is not necessary for an employee in any of the three outside crews to have completed any preharvest operation at the Company.

Thus, an employee must complete the prior season in order to be eligible for hiring preference in the ensuing one. Further, the employee must appear within three days of the recall date for that season in order to secure employment. Failing this, another worker may be hired in his/her stead. After the season has begun, to obtain work the employee must apply with the particular foreman who has an opening in his/her crew: requesting work from one foreman whose crew is complete will not suffice to obtain a job in another crew which is not full at the time. The worker must check with each individual foreman for opportunities if he/she wishes to work in that foreman's crew. More importantly, the foreman him or

herself is not responsible for contacting employees to work once the season has begun. The employee must persist in presenting him/herself for work if he/she wishes to be hired.

In the pruning season, respondent employs seven crews of between 25 and 30 workers. Under the rules set out above, if a worker has completed the pruning season (i.e., worked until laid off), he/she is entitled to preference for employment in the pre-harvest, which customarily begins about mid-April.

Approximately four hundred twenty people are hired for the pre-harvest. Ray Major, respondent's ranch superintendent,^{8/} gives his foreman a copy of the records from the last payroll period in the prior season to assist them in calling those who finished that season. While the supervisors tell the foreman how many people are required for any given season, it is the foremen themselves who select which people are to be hired.

Similarly, for the harvest period, people entitled to first preference for recall are those who have worked in the pre-harvest up until their layoff date. Since the total needed for the harvest exceeds the total who worked during the pre-harvest (see infra), after exhausting the number of potential hires in this group, the next category of those entitled to employment priority are individuals who have worked for the company at any time previous. The order in which particular crews are called for the harvest is

8. Major's uncontroverted testimony about the "seniority" system provided the bulk of the foundation for the findings concerning respondent's seniority policies.

determined by "crew seniority." Following is a list of the order of recall according to the particular foreman who heads the crew.

1. Abel Jimenez
2. Delores Mendoza
3. Pablo Veloria
4. Ernie Estrala
5. Ernie Cardenas
6. Romulo Papoy
7. Ernie Camacho
8. Ramon Hernandez

The three crews considered "outside" crews, those of Rudy Silva, Yolanda Silva and Emiliano Rodriguez, are then retained.

As noted, the harvest generally commences around the end of July or the first week of August, and begins with varieties known as exotics and flames. Crews start off with approximately 30-35 members and may reach as many as 60 per crew as labor needs increase. At the peak of the harvest of 1981, crews were employed with approximately 600 workers in the aggregate.

According to Major, there is no formal, written set of rules pertaining to employees, such as an employee handbook. Nothing is distributed to employees which would set out those particular restrictions to which they are subjected or which might provide a possible reason for disciplinary action on the part of the company. The company does give warning slips to employees, but usually these are only for deficiencies in work performance. An employee who demonstrates repeated problems in this regard will receive first an oral warning, then two written warning notices,

pointing out the difficulty. After the receipt of the second written warning, the next time the employee commits the same type of error, he/she can be discharged.

Major testified that certain acts by employees render them liable to immediate discharge. These acts include disobeying a direct order by the foreman, stealing, drinking on the job, fighting, destroying company property, threatening a foreman and carrying a deadly weapon.^{9/}

By contrast, not reporting for work for three consecutive days without notifying the company does not furnish grounds for discharge. Rather, an employee merely loses his/her "seniority" as a result. Assuming the employee is desirous of re-employment, that employee has to wait until an opening in the crew arises. It is the employee who is personally responsible to check with the particular foreman or foremen involved to discover whether an opening has occurred. "Suspensions" are not available as a disciplinary measure for members of seasonal crews. This form of discipline may only apply to "steadies" or ranch employees who work most of the year.

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9. Infractions of these last two purported rules were claimed as the basis for discharging alleged discriminatees Gilberto and Catalina Baez.

2. Paragraph 5:^{10/} Discriminatory "Layoffs" of
Remberto Duran and Jose Luis Madrigal

General Counsel alleged that on or about June 10, respondent discriminatorily laid off Remberto Duran and Jose Luis Madrigal because of their support for and activities on behalf of the Union.^{11/}

On June 10, the crew of foreman Eduardo "Lalo" Cardenas was slated for a seasonal layoff. However, a few days prior to that actual date, Cardenas had been ordered by supervisor Rolando DiRamos to select about six men from his crew to be assigned to a skeleton force which would, work replanting vines apart from the crew itself, and which would continue to be employed past the layoff date.^{12/} Another group of five employees from the crew worked past the layoff date moving irrigation pipes. Cardenas' crew, as a unit which included the alleged discriminatees, returned from the layoff and resumed its duties about the first week in July. It is the exclusion of Duran and Madrigal from these two skeleton work forces employed during the one-month layoff period which General Counsel

10. The paragraph numbers referred to are those contained in General Counsel's "First Amended Consolidated Complaint."

11. Duran's first name was originally alleged to be "Roberto." A third individual, Francisco Tirado, was dismissed from the allegation, as there existed insufficient proof that he engaged in protected, concerted activities prior to the layoff.

12. Cardenas testified that DiRamos requested that the selection be made on the Saturday prior to the layoff. The replanting crew began its duties on Monday, June 8, while the remainder of the crew was still employed.

claims is the outgrowth of discrimination resulting from their participation in protected, concerted activities.

Madrigal's Union activities consisted of wearing a Union button and personally voicing to foreman Cardenas his preference for the Union. Specifically, Madrigal testified that Cardenas would state to the worker that he was not in agreement with the Union as a result of his unfavorable personal experiences with it. In past years, dispatches would be issued while the foreman was in Mexico; upon returning, Cardenas claimed, the Union would ask him for money to go to work. Madrigal replied that that may have been the case in the past, but if the system had not been successful previously, it was time to reexamine it. The worker asserted that he wore his Union button during work at such times and places as to have been easily seen by his foreman.

While Cardenas basically denied any knowledge of Madrigal's Union activities, and respondent thus argues that it was not possessed of any knowledge of same, I find that sufficient evidence exists in the record for concluding that Madrigal demonstrated support for the Union, and that respondent had knowledge of that fact. (Abatti Farms (1979) 5 ALRB No. 34; San Clemente Ranch (1982) 8 ALRB No. 50; Sandrini Brothers (1982) 8 ALRB No. 68.)^{13/}

13. Alternatively, respondent argues that Madrigal's minimal and passive acceptance of the UFW" was not "the sort of conduct which marked [him] ... as [a person] exercising an influence on fellow workers on behalf of the UFW," as per Joe Maggio, Inc. (1978) 4 ALRB No. 37. However, as noted in Matsui Nursery (1979) 5 ALRB No. 60, a discriminatee's role in protected concerted activity need not necessarily "be an active or vocal one to support a conclusion that his discharge violated . . . the Act."

The extent of Duran's participation in protected, concerted activities, and respondent's knowledge thereof, were more firmly established in the record. He stated that prior to the 1981 election, he distributed Union leaflets, cards and bumper stickers.^{14/} Like Madrigal, Duran also related similar conversations that he had with Cardenas in which the worker espoused the pro-Union view, and in which Cardenas recounted his negative experiences with the Union dispatch system.^{15/}

Duran testified further that one day before the election a meeting was held in which supervisor DiRamos addressed the Cardenas crew. DiRamos' speech concerned deductions that would be taken from the workers' checks for "politics" in the event that the Union won the election. He referred to a newspaper article from a periodical he held in his hand which ostensibly set forth the details. DiRamos then asked whether anyone wanted to read the article. At that point Duran stood up, and, branding the article propaganda, grabbed the newspaper, tore it up and threw it to the ground, all to the cheers and applause of his coworkers. Duran's pro-Union sympathies were thus clearly made manifest to respondent's supervisors.

While he may have selected the participants, Cardenas himself did not supervise the small work forces, but was laid off

14. Duran testified in addition that Madrigal had assisted him in this regard. Interestingly, Madrigal's recital omitted any reference to this particular.

15. Cardenas himself admitted making remarks on this subject to Union representative Juan Cervantes, and also admitted that he, on occasion, opined to workers that the Union was "no good."

coterminously with his crew. When asked what considerations he took into account when he made the selections for those groups, Cardenas testified that he attempted to obtain people who came to work by themselves, who did not have any problems getting rides to work, and who were not concerned about having lunch with other members of their families employed by Lucas,^{16/} and thus could work separated from them.^{17/}

Although Duran and Madrigal both contended that less senior workers than they were selected for the skeleton crews, Cardenas stated that seniority had nothing to do with the assignment. According to Ray Major, the company regularly utilized a portion of a crew to perform what essentially were "odd jobs." Respondent's practice was to ignore "seniority" in determining who was to be laid off and who retained under these circumstances.

Cardenas advanced as the reason for not selecting Duran was that Duran worked with his wife in the crew and ate his lunch with her: others, like Duran, who worked with their wives had also not been chosen. Further, Cardenas stated that he was unaware whether Duran could drive the tractor as needed to assist in moving pipes. Antonio Battres, another employee, was chosen because the foreman knew he possessed that skill and was a mechanic as well.

Interestingly, Cardenas asserted that Madrigal was

16. Typically, many employees joined their relatives employed in the same crew or in crews working close by for the mid-day meal.

17. The replanting work was to be done at respondent's M & L Ducor ranch, which was located about six miles from where the crew was working.

originally selected to participate in the "odd jobs" crew, but that he did not come to work on the Monday when the work force was assigned its specific tasks.^{18/} Thus, another worker was chosen to replace him.

On rebuttal, Duran stated that he had no problems getting to and from work, that he had, in the past, worked apart from the crew, and that taking his lunch separated from his wife presented no difficulties for him. He additionally asserted that he had previously driven a tractor and moved pipes, but neglected to state whether such tasks were performed in such a manner as to make Cardenas aware of the worker's proficiency at them. For his part, in response to Cardenas' selection rationales, Madrigal stated that he had his own car, and thus would have no problem getting to and from work, although he did admit that he worked with his mother in the Cardenas' crew.

Significantly, from March 18 through March 30 and from May 5 to May 25, 1981, Cardenas' crew was laid off while portions of the crew, as had happened in June, were retained to perform odd jobs. Both Madrigal and Duran did not work during the March layoff; only Madrigal worked during the May layoff, and then it was only for three days. In the previous year, 1980, during June and July, all

18. Cardenas claimed that he chose which workers would participate on the Saturday before June 8. It is not entirely clear how Cardenas manifested the selection on that Saturday, since he maintained that the actual assignments, and the segregation of employees from the crew, did not take place until the following Monday. Madrigal did not specifically deny any interaction with Cardenas on Saturday, June 6. However, he did claim to have protested his failure to be chosen to DiRamos on or about the time of the layoff. The parties stipulated that Madrigal was in fact absent on June 8.

the men in the crew were retained, including Duran and Madrigal, while the women were laid off.

The guiding legal principle applicable here, as well as to the other allegations in the complaint concerning discrimination in regard to employee tenure, is that the General Counsel must demonstrate, by a preponderance of the evidence, that an employer knew or at least believed that an employee had engaged in protected, concerted activities, and discharged or otherwise discriminated against him/her for that reason. Lawrence Scarrone (1981) 7 ALRB No. 13. Once General Counsel has established these prima facie elements, the burden shifts to the respondent to show that it would have taken the same action concerning the employee or employees regardless of any participation in protected, concerted activities. It is thus incumbent upon the General Counsel to prove that "but for" a worker's union or protected activities, no adverse action regarding his/her tenure and/or terms and conditions of employment would have resulted. Nishi Greenhouse, (1981) 7 ALRB No. 18; Merrill Farms (1982) 8 ALRB No. 4; J & L Farms (1982) 8 ALRB No. 46; Wright Line, Inc. (1980) 251 NLRB 1083. Stated in another fashion, to establish a violation of the Act it must be shown that there was a causal relationship between the employee's participation in protected, concerted activities and the personnel action taken in regard to him/her. Jackson & Perkins Rose Co. (1979) 5 ALRB No. 20; Verde Produce (1981) 7 ALRB No. 27.

General Counsel argues that the reasons advanced by respondent for failing to select Duran or Madrigal were inadequate in that neither employee had problems with transportation getting to

and from work, neither had difficulty eating lunch apart from family members, and both had experience performing the tasks assigned to the skeleton crews.^{19/} A witness called on rebuttal, Arturo Cortez, testified that he, as a second foreman in the Cardenas crew, observed one employee who was chosen for the skeleton crews ride to work with other employees, and noted that another worker so assigned ate lunch with numerous members of his family who also had been employed in the crew.^{20/} Thus, the criteria for inclusion to the small group appear to be selectively applied, and raise a suspicion of discriminatory conduct.

However, notwithstanding any of the foregoing, I am unable to conclude that the failure to select^{21/} Duran and Madrigal to participate in the reduced work forces was shown to be, by a preponderance of the evidence, unlawfully motivated. While they may have been able to rebut any of Cardenas' purported impediments to their assignment, they were not given the opportunity to do so in a

19. These facts were asserted by the discriminatees themselves, principally when called as rebuttal witnesses.

20. Selected for the replanting group were employees Jose Luis Romero, Eraclia Hernandez, Ramon Medel, Jesus Alvarado, Rafael Batrez and Guillermo Hernandez. Those included in the pipe-moving group were Santos Romero, Antonio Batrez, Alfonso Magana, and Javier Magana. Another employee, Miguel Lamas, worked past the layoff date performing miscellaneous labor. As is obvious from this list, several of these employees bear one another's surname. Whether they were actually related was not shown in the record.

21. General Counsel alleged that Duran and Madrigal were discriminatorily "laid off." Technically, the entire crew was laid off on June 10, and thus the two workers could not be said, in this sense, to be the objects of discrimination.

face-to-face confrontation with the foreman. Duran did in fact work with his wife. On the Monday in question, the six or so employees chosen were put to work about six miles distant from the crew itself. Thus a problem was created for those workers who might customarily lunch with their relatives. Madrigal was absent from work on the day that the assignments were implimented, and was therefore in no position to offer his services.

While there was no indication in the record as to the total number of employees so utilized, the fact remains that neither Duran nor Madrigal had been selected during two prior layoffs that year to remain and assist with odd jobs, save when Madrigal worked for three days in May. Participation in union activities does not confer immunity on employees from ordinary employment decisions. Royal Packing Co. v. A.L.R.B. (1980) 10 Cal.App.3d 826, 833. If these employees had not been chosen that same year to work with a reduced group following a layoff, there is no reason that they should be included in similar groups following their participation in protected concerted activities.

Accordingly, it is recommended that this allegation be dismissed.

3. Paragraph 6: Discharges of Juan Juarez and Samuel Viramontes

a. The Facts Presented

General Counsel alleged that the two above-named employees were discharged on or about July 9, 1981 "because of their support for and activities on behalf of the UFW." The evidence which, for the most part, contained little conflict, demonstrated that these two workers, along with a third, were alleged to have left work early on a particular day; that, as a result, on the next day they subjected to continual verbal abuse a fellow worker appointed as time keeper who had reported their early departure to a supervisor; that when questioned about the harassment by supervisor Jose Becerra, one of the three challenged the supervisor to fire them, and he obliged. Totally absent from the General Counsel's proof was any evidence of a "causal connection" between the actual discharges and any Union activities. The three singled out for a form of disciplinary treatment had occasioned it by their own behavior. The fact that two of them had engaged in Union activities prior to this time was no more than a mere coincidence.

However, while the discharges of Juarez and Viramontes may not have been violative of the Act, the subsequent refusal to reinstate them after several days, despite the reinstatement of the third worker who actually instigated the supervisor's directive that the three be discharged, is found to be contrary to sections 1153(a) and (c).^{22/}

22. Technically, the complaint alleged violations arising from the "discharges" of Viramontes and Juarez. I find that the

(Footnote continued----)

Juan Juarez worked for the respondent from 1974 to 1976 and again from 1979 to 1981, and was employed in all three phases of Respondent's viticultural operations. That he had engaged in protected concerted activities of which Respondent had knowledge was not disputed by the company. In testimony which was uncontroverted, Juarez presented evidence that in January of 1981 he translated for a group of workers protesting the reputedly low wages they were receiving for pruning a particularly difficult plot; and that he was active on behalf of the Union during its organizing drive in May and June, speaking in favor of the Union and passing out leaflets ^{23/} and authorization cards. At a company-held meeting scheduled just before the election, Juarez openly espoused the Union point of view. Previously in that week he had detailed problems experienced by Lucas' workers on the Union Wednesday morning radio broadcast on station KXEM. His foreman later commented to him that it was "brave" for Juarez to speak "against" the company.

Regarding Samuel Viramontes, he began working for respondent in the spring of 1979. He testified that prior to the

(Footnote 22 continued—)

refusals to reinstate them, which provide the actual basis for the violations found, were fully and fairly litigated. Mendez, Juarez, Viramontes and Becerra all presented testimony regarding the reinstatement of the three workers, and counsel had full opportunity to examine and cross-examine them. Findings on an issue may be made where that issue was related to matters alleged (as here with the discharge - refusal to reinstate), and was fully litigated. George A. Lucas & Sons (1981) 7 ALRB no. 47, see also Merrill Farms (1982) 8 ALRB No. 4; Joe Maggio, et al. (1982) 8 ALRB No. 72; see generally Anderson Farms (1977) 3 ALRB No. 67; Prohoroff Poultry Farms (1977) 3 ALRB No. 87.

23. At one point during the drive Juarez gave a Union leaflet to his foreman, Pablo Veloria.

election, he assisted Juarez in distributing Union leaflets and authorization cards among the members of his crew before beginning the work day and also at lunch time. While so occupied, his foreman Veloria would be in the immediate vicinity. Viramontes also stated that he wore a Union button before and after the election.

In reference to the events leading up to their terminations, Juarez, Viramontes, and co-worker Pedro Mendez were accused by a fellow employee acting as time-keeper^{24/}, Victor Jimenez, of leaving work early. Juarez and Viramontes stated that they had in fact left work about ten or twelve minutes before the end of a particular work day, while Jimenez reported to supervisor Becerra that the three departed some twenty minutes to one-half hour before their actual quitting time.^{25/}

The three discussed the matter with Jimenez and Becerra the day after it took place. Juarez denied to Becerra that the three had left as early as Jimenez contended. Juarez testified that he then asked Becerra if he was going to place Jimenez as a foreman. Becerra responded, no, but Jimenez was in charge of keeping the time

24. The three had been working with a group assigned to replant vines, apart from the rest of the Veloria crew, at the Famosa Ranch. No foreman was at the site to supervise directly.

25. Since it was not maintained by either side that leaving work early was the actual cause of the discharges, the facts surrounding the incident are not altogether significant. The trio was engaged in a planting operation and had used all the vines that they had carried out to the fields. Juarez estimated that it would take about five minutes to exit the field and another five minutes to walk to the gondola where the plants were kept. According to him, it was then about ten or twelve minutes to quitting time or 4:00 p.m. As the time left in the work day was not sufficient to allow a trip to the gondola and back, the three decided to cease work when they ran out of plants. Viramontes and Juarez then left the field and went home.

and letting the people know when to take breaks and when it was time to quit, etc. Juarez then asked Jimenez whether he was a foreman or not. Juarez omitted from his account, but did not actually deny, that Becerra also told them during the course of this conversation that they should "forget about" the incident, but that they should respect the person he left in charge.^{26/}

Following this encounter, about mid-day, the three workers confronted Jimenez. Juarez, Viramontes and Mendez were approaching the water can as Jimenez was coming from that direction. According to Juarez, Jimenez commented to the workers that "he" was sure being "bothersome." All three of the workers asked Jimenez to whom was he talking. Jimenez replied that he was talking to Juan. After Juarez had gotten his drink of water, he and the other two workers went up to Jimenez and asked if Jimenez wanted to talk to Juarez. Juarez stated that he was disturbed over what Jimenez had told Becerra, that he had not gone out one half-hour before quitting time, as Jimenez maintained, but rather had left only ten to twelve minutes before the appropriate hour. Juarez then asked Jimenez whether he was either a foreman or a second. Jimenez responded in the negative on both counts. As Juarez turned to walk away, Jimenez said to Viramontes that he "didn't want to fight." Viramontes responded that no one wanted to fight, but if he was a worker like the rest of them, he should tell the truth.

Juarez, however, left out an all-important detail that

26. Jimenez and Becerra provided mutually corroborative versions of these details. Jimenez impressed me as a particularly credible witness: his testimony was consistent with that of several other witnesses, including the alleged discriminatees themselves.

places Jimenez' remarks in context. It appears that he and Viramontes, following the meeting with Becerra that morning, continually subjected Jimenez to verbal abuse. As Jimenez noted, throughout that day, Juarez and Viramontes were berating him, calling him "bad names," accusing him of being a "brown nose" ("barbero"), telling him that the thing was to screw the company, not to have it screw the worker. Juarez in particular mentioned to Jimenez that when Lucas (the boss) died, they were not going to leave him (Jimenez) the ranch. Viramontes told him also that he was really "shit on a stick" ("cagar al palo"). Jimenez stated that he told Juarez and the others to essentially cut it out, to stop talking, that he had had it with their jibes.

Pedro Mendez supplied the following not altogether dissimilar version of the encounter between Jimenez and the three workers as they were going for water the day prior to the terminations:

Juarez: "Hey, let's see if somebody doesn't tell-tale on us."

Jimenez: "Juan, you're sure fucking around."

After they returned from the water can, Juarez stated, "Victor, did you say something?"

Jimenez: "Yes, that I don't want for you to be yelling at me anymore. ... I don't want to fight."

Juarez: "Neither do I. It's just that I wanted to know why you told me that."^{27/}

27. On cross-examination, Mendez added that Juarez told Jimenez: "Nobody's telling you anything. If you want to take it upon yourself, well, that is it."

Mendez also testified that Juarez and Viramonte berated and teased Victor that entire day. While he claimed that the entire crew engaged in such behavior, he could not recall any of the names of the crew members who were participating in this conduct.^{28/} He could, however, remember that Juarez and Viramontes would hurl the epithets detailed above. Mendez further attributed to Viramontes the remark "you fucking old man, it's as if they'll give you the ranch when Lucas dies."

Likewise, Viramontes admitted being a party to the harassment of Victor Jimenez. Juarez sarcastically asked Victor: "Would it be time to drink water?" Jimenez replied, "You're sure bothersome," or "a pain." Mendez then asked "Who do you tell that to?" Jimenez answered, "With you, Juan Juarez." Juarez then stated, according to Viramontes: "Okay, we're going to go find water, we'll be right back."^{29/}

Viramontes testified that the following colloquy ensued after the workers returned from getting thier drink:

Juarez: "Did you want to tell me something, Victor? All you're doing around here is yelling and being noisy. In my crew, I

28. I attach little credence to the assertion that the whole crew engaged in this behavior. No other witness was asked to corroborate it. Further, apart from the three so accused, none of the other crew members were questioned about any name-calling directed at Jimenez. Unlawful discrimination could not have been the rationale behind the supervisor's inquiry (discussed infra), as Mendez admitted that he had not engaged in any Union activity.

29. On cross-examination, Viramontes added that Juarez stated in addition, "I'll come back [from getting water] and see what you want to tell me."

yell, jump, sing and they never tell me anything. Why do you act that way? Are you a foreman, Victor?"

Jimenez: "No.

Juarez: "Are you a second Victor, sir?"

Jimenez: "No."

Juarez: "Then what are you?"

Jimenez: "I'm a worker same as you."

At that point, Viramontes stated that he told Jimenez to tell the truth about the previous day and the time that the workers left. Jimenez then said, according to Viramontes, "I don't want to fight." The workers replied, "Neither do we. Nobody wants a fight. We feel bad because being a worker the same as us, don't do that or you do that."

As can be readily seen from all of the above testimony, the barbs of Juarez and Viramontes contained no challenge or threat of physical harm. Also absent from the remarks were expressions which might rise to the level of serious insults or "fighting words."

That evening, Becerra learned from foreman Abel Jimenez, Victor's brother, that Abel had received reports that Victor was being verbally harassed all day by his fellow employees. The next day, Becerra spoke to Viramontes, Juarez and Mendez, and accused them of wanting to fight with or "beat up" Victor. They denied this. There was then another discussion of the time the workers left work the previous Monday. Becerra asserted that he had a witness who claimed that the three had left one-half hour before quitting time. Juarez challenged the supervisor to name him. When the supervisor pointed out worker Carlos Barrajas, the worker said

the three had left at ten minutes before 4:00 p.m. Juarez then stated to Becerra, "There's your proof."

Viramontes recounted the specifics of statements which led to the termination – Pedro Mendez told Becerra: "If you're going to start like always, there is the white line."^{30/} If you're going to fire us, fire us." Becerra responded, "You are fired, the three of you . . . there's no more work for you. Come over to sign some papers." Whereupon, Mendez stated "Why are we fired? We have no reason to sign any papers."

Several days thereafter, however, Becerra rehired Mendez, but did not rehire Viramontes or Juarez. Becerra testified that a few days following the discharges, Mendez went to the supervisor's house to ask for his job back. Becerra told the worker that he could not do that, that Mendez had wanted to fight with Victor. Mendez responded, according to Becerra, that it wasn't he that wanted to fight with Victor, it was the others. Becerra stated that he then spoke with Jimenez to verify what he had been told by Mendez.^{31/} After Mendez' version was corroborated, Becerra discussed the matter with superintendent Ray Major, who allowed Becerra to rehire the worker.

30. The "white line" expression refers to the line down the middle of the highway. The Spanish phrase is somewhat akin to "hit the road."

31. Interestingly, Becerra maintained that he had, on the day of the terminations, spoken to employees Mario Pompa, Jose Ayon, and to Victor himself, to verify accounts of the problems caused by Viramontes and Juarez. It would therefore appear inconsistent that he perceived the need to again speak with Victor regarding what had taken place. Becerra did not refer in his testimony to the workers' disclaimers that "no one wanted to fight."

By contrast, Becerra also testified that Juarez and Viramontes came to ask him for their jobs back, as Mendez had done. Becerra told them that they, would have to talk with Victor. Viramontes responded, according to the supervisor, that if he wanted him to "kiss Victor's ass, forget it."^{32/} Thereupon Becerra told him that there was nothing he could do about rehiring the worker.

Juan Juarez, when called as rebuttal witness, provided a somewhat different version of the above interview. He stated that he and Viramontes did in fact go speak with Becerra after they learned that Mendez had been rehired. According to Juarez, after they had first spoken to Becerra, he told them that he had to talk with the superintendent and would let them know on the following day. When they went back on the following day with ALRB field examiner Joe Sahagun, Becerra, according to Juarez, came out and told them no, he was not going to give them their jobs back.

Owing to the general lack of credence which I could attach to much of Becerra's testimony and to the overall consistency and candor of Juarez' accounts, it is Juarez, rather than Becerra's recitation of this encounter which I credit.

b. Analysis and Conclusions

The discharges, viewed in isolation, appear justifiable. The workers themselves prompted the discipline that they received. No evidence was preferred, regarding the terminations, of "disparate treatment," as per Royal Packing, supra; it was not shown that workers who had created similar problems were

32. Viramontes was not asked specifically to refute this particular assertion.

not disciplined by the company. Nor can any inference of discrimination based on a pretextual discharge be drawn from General Counsel's supposition that the company maintained that these workers were discharged because they fought, or wanted to fight, with Victor Jimenez, while the evidence demonstrated that "no one wanted to fight" save perhaps Victor, by his own admission.^{33/} (See, e.g., Perry's Plants, Inc. (1979) 5 ALRB No. 17; Mission Packing Company (1982) 8 ALRB No. 47. While that may have been the rationale that prompted Becerra to inquire as to the workers' conduct on the previous day, Becerra did not indicate that he was predisposed to terminate the workers for that reason. Rather, I find that the proximate cause of their discharge was the challenge levelled at Becerra which called his authority into question, i.e., Mendez' remark: "If you're going to start like always, there's the white line. If you're going to fire us, fire us." This lack of respect for his authority, which echoed the mocking manner in which the alleged discriminatees interacted with Jimenez, gave respondent a basis for the terminations.^{34/} (S & F Growers (1978) 4 ALRB No. 58; see also Martori Brothers Distributors (1978) 4 ALRB No. 80.)

33. Victor testified that when he spoke to his brother Abel regarding how things had gone at the fields on the day in question, he told him that things were fine. Victor did this, he stated, because he had made up his mind that he was going to "fight" with the workers, and didn't want to inform Abel of a problem because he wanted everyone to be present at the same work site the next day.

34. The testimony did not support the statement in the joint declaration of the three workers that they were told by Becerra that they were fired for "not obeying Victor and for looking for a fight."

Nevertheless, although I am unable to find that the discharges, per se, were discriminatory, the willingness of respondent, through Becerra, to rehire Mendez, while not rehiring Juarez and Viramontes, leads to the conclusion that their tenure was handled in a discriminatory manner. Juarez, and to a lesser extent Viramontes, were open and visible supporters of the Union. The two were acknowledged organizers for Veloria's crew. Juarez, bilingual and articulate, was at the forefront of protected, concerted activities at respondent's work place. He was the spokesperson for the workers during a wage protest in early 1981; he had spoken "against" the company on a public radio broadcast; he had presented the Union point of view at a company-held employee meeting. By contrast, Mendez stated that he "never" engaged in any Union activities such as helping to organize for the Union, distribute Union literature or wear Union buttons.

When the conduct which led to their discharges is frankly examined, it appears that the alleged discriminatees did little more than needle or pester Victor Jimenez, a fellow employee.^{35/} At no point did they threaten him with any physical harm, or hint, through word or gesture, that that might be their ultimate object.^{36/} Further, while respondent might have legitimately sought

35. Juarez' pointed reference to the fact that Jimenez was neither foreman nor second, though tinged with sarcasm, emphasized that Jimenez' authority was not so extensive, and that Juarez, while teasing Jimenez, was not ridiculing or belittling a supervisor.

36. To the contrary, Viramontes told Jimenez "nobody wants to fight."

to avoid a potentially volatile situation which might arise from daily contact and conflict among the workers, Viramontes and Juarez did not work in the same crew as Jimenez. Thus, the contact between these employees would be minimal, and the possibility of recurring conflict would be remote.

Juarez, as noted, was an outspoken Union advocate. His outspokenness undoubtedly spilled over into other facets of his work existence, such as his relationships with his fellow employees. While his behavior and that of his coworker, Viramontes, was something less than commendable, the discipline they received as a result, unconditional termination, was entirely too harsh. This response by the company conveyed the message that employees who at one point were too vocal about Union affairs might run the risk of a hair-trigger response from management in the event they were culpable of a trivial infraction, not related to specific Union activities.

Given the nature of the misconduct, respondent should have given Juarez and Viramontes a second chance, as it was willing to do with Mendez. It appeared that it was not the discriminatees' off-hand remarks to Jimenez which instigated the discharges, but rather those of Mendez which directly demeaned the supervisor's authority. Becerra testified that he more or less investigated Mendez' non-involvement in the Jimenez incident, and asked Major if the worker might be rehired. Juarez testified that Becerra likewise stated that he would ask Major if Viramontes and Juarez could get their jobs back. On balance, Mendez' challenge to Becerra seems at least as serious a matter as the verbal by-play of Viramontes and

Juarez. Yet the former was reinstated while the latter two workers were not.

Additionally, the acts of Viramontes and Juarez did not fall within one of the categories enumerated by Major as cause for immediate discharge.^{37/} Thus, to Major's way of thinking, they were not serious enough to warrant this treatment. This Board has recognized that discriminatory handling of worker tenure may manifest itself in the guise of superficially explainable discipline. In J & L Farms (1982) 8 ALRB No. 46, violations of sections 1153(a) and (c) of the Act were found where employees engaged in conduct which would ordinarily have resulted in warning notices, but which was utilized by the company as a basis for termination. Applying a Wright Line (supra) analysis, the Board stated:

Respondent asserts that the delay of [discriminatees] Alcala and Berber in obeying their forewoman constituted insubordination as defined in its written rules of employment. The evidence, however, shows that previous terminations were based on serious infractions such as intoxication and fighting on the job. Generally, warning slips were given for minor infractions such as tardiness or absence without permission. Four warnings in a calendar year could lead to termination. After reporting the

37. As outlined supra, those particular infractions were: disobeying a direct order by the foreman, stealing, drinking on the job, fighting, destroying company property, threatening a foreman, and carrying a deadly weapon. Although Becerra testified that he essentially "ordered" the workers to "respect" the person he left in charge, I do not find that the behavior of Juarez and Viramontes was on the same level as disobeying a direct order of a foreman. Respondent underscores this point in its brief by stating that "no employee would have been retained by this or any other employer after ridiculing a supervisor for hours. . . . Such conduct is unquestionably cause for discharge, and was plainly the sole reason for the discharge of Juarez and Viramontes ..." (Emphasis supplied.) The employees, as noted, did not ridicule a "supervisor."

incident to [co-owner] Lindley, forewoman Olivas believed the incident merely warranted a warning. Lindley did not tell Olivas of his decision to terminate Acala and Berber until after work that day. We therefore find that the conduct of Acala and Berber did not warrant discharge under respondent's established personnel policies. The only remaining explanation for the discharges is the conclusion "... that Lindley terminated Acala and Berber in retaliation for their participation in protected concerted activity." (Id. , p. 4; see also, e.g., Robert H. Hickam (1982) 8 ALRB No. 102, where workers who had engaged in protected concerted activity one day became enmeshed in that respondent's disciplinary machinery the next.)

Similarly, in the instant case, the conduct engaged in by Viramontes and Juarez (verbal harassment of a fellow employee) was not recognized by Major as serious enough to warrant immediate termination. Mendez' remarks to Becerra, however, did provide a basis for worker discipline. When Mendez was reinstated, several days after the remarks were made, and Juarez and Viramontes were not, the "only remaining explanation" for the failure to reinstate these employees was that they had engaged in protected, concerted activities. In other words, I find that "but for" their prior exercise of their section 1152 rights, Juarez and Viramontes would have been reinstated.^{38/}

Accordingly, it is recommended that violations of sections 1153(a) and (c) be found based on the failure to reinstate Juan Juarez and Samuel Viramontes.

38. Previous mention has been made herein of the fact that respondent does not have a formal suspension mechanism. However, that is in effect the type of discipline which Pedro Mendez received and which should have been accorded to Viramontes and Juarez.

4. Paragraph 9; Refusal to Re-hire Petra, Ricardo and Alma Fuentes

a. The Facts Presented

General Counsel alleged that on or about August 13, 1981, Respondent refused to rehire Petra, Ricardo Sr. and Alma Fuentes "because of their support for and activities on behalf of the UFW."

Petra Fuentes began working for respondent in 1975. At various times since then, members of her family including her daughter, Alma Delia, her husband Ricardo, and her son, Ricardo Jr. also worked for the company. Petra was employed in each of the harvest seasons from 1975 through 1978. In 7 ALRB No. 47, it was found that Petra, Ricardo and Alma were unlawfully refused rehire for the 1979 harvest season as a result of discrimination stemming from her providing testimony in 5 ALRB No. 62 involving this respondent. Petra Fuentes also filed charges (number 80-CE-194-D) alleging that she and members of her family were unlawfully refused rehire in April and October of 1980.^{39/} The instant case concerns the alleged refusal of the company to rehire her for the 1981 harvest season. Thus, for the harvests of 1979 and 1981, and for alleged conduct occurring in 1980, Petra Fuentes has filed charges with the Board claiming that this respondent, for unlawful, discriminatory reasons, has refused to hire her and members of her family.

The evidence considered by the hearing officer in 7 ALRB

39. This charge was presumably dismissed: evidence in the instant case demonstrated that Alma and her husband actually worked at various times during 1980, and that Petra was hired for the harvest that year but obtained a leave of absence so that she might work with her sons at Mid-State Horticultural Company.

No. 47 included representations by the Fuentes family that they were not contacted by the hiring foreman to work in the harvest season,^{40/} while the foreman (Pablo Veloria) and his wife maintained that they called Alma Fuentes to work, but she declined, and that Petra and Ricardo had lost their seniority preference for hire in the harvest by rejecting an offer of employment in the prior season. Despite Petra's representation herein that she has been "affiliated" with the Union since 1970, in the prior case it was specifically found that as there was no evidence of Union activity: the 1153(c) aspect of that case was dismissed, and the discrimination found therein was based upon Petra's providing testimony in a prior ALRB proceeding, i.e., a violation of section 1153(d) of the Act.

In 1981, Petra and the members of her family worked in the crew of Ernesto Camacho. Petra Fuentes was extensively involved with the Union organizational campaign that took place in late May.^{41/} She met on several occasions during that time with Union representative Juan Cervantes at the Union office at Forty Acres. There she was assigned as the principal organizer for Camacho's crew. Also selected to function as organizers were her

40. In the instant case, Petra Fuentes testified that in her experience with the respondent the foreman customarily telephoned when a season was about to begin.

41. Petra testified at length that prior to the campaign itself, she participated in a group protest with members of her crew and that of the foreman, Pablo Veloria. The protest involved dissatisfaction with the compensation the crews were told they would receive for pruning a particular block. No evidence was presented regarding Petra's particular efforts, in that protest (cf. Matsui Nursery, supra). Juan Juarez, another alleged discriminatee, was chosen as the worker's representative during the confrontation.

daughter, Alma Delia, and her husband, Ricardo. Members of the Fuentes family, in addition to working as organizers for the Camacho crew, were responsible for distributing and collecting authorization cards among the members of the Jimenez and Armington crews.^{42/}

Ricardo Fuentes was later named as a Union observer for the June 2 election.

The evidence, which on this particular issue was basically not controverted, demonstrated that Petra Fuentes and the members of her family openly engaged in protected, concerted activities, such as distributing Union literature and authorization cards, and did so at such times and places that it might readily be inferred that respondent, through its foremen and supervisors, was well aware of the support for the Union which existed among the Fuentes family.^{43/}

42. According to Petra, other organizers who were selected and the crews in which they operated were as follows: Gilberto Baez, also for Camacho's crew; Remberto Duran and Jose Luis Pulido for "Lalo" Cardenas' crew; Jose L. Cisneros for Ernie Estrala's crew; Juan Juarez and Samuel Viramontes for Pablo Veloria's crew; Maria and Ezekiel Perez for Ramon Hernandez' crew. Several of these individuals, as reference to the remainder of this decision demonstrates, were also alleged to be victims of discrimination.

43. Petra Fuentes testified that on the day of the Union election itself, she was told by foreman Camacho in the presence of her entire crew that the Union was going to lose because DiRamos had told him that superintendent Major had "bought" fifty people to vote on behalf of the company. She stated that she thereupon told her fellow workers not to be discouraged, that they should vote for the Union in any event. While Fuentes unquestionably may have encouraged her fellow employees to vote for the Union, I am unable to credit her accusation regarding the "bought" workers as no other workers were called to corroborate it. Despite Ms. Fuentes thorough acquaintance with Board processes, nowhere in any declarations she filed with the Board is there a reference to this very damaging detail. The inclusion in her testimony of such a statement provided evidence of her lack of candor.

Following the Union victory, Petra Fuentes appeared as a spokesperson for two hundred or so of her fellow employees. As her remarks were translated by Union representative Juan Cervantes, she confronted Ray Major at the company shop with the assembled workers and told him that since the Union had won, negotiations should commence as soon as possible. When Major replied that he had to await word from the company attorneys on this issue, Ms. Fuentes stated that he should notify the people as soon as he found anything out from the attorneys.

Petra, Ricardo and Alma Fuentes worked until the tipping operation was finished about mid-June, i.e., when workers from her crew were laid off in the pre-harvest. Following that time, she and some of the members of her family worked in the picking for El Rancho Farms in Arvin until approximately the 4th or 5th of August. For several years she had worked for Rudy and Yolanda Silva in Arvin.^{44/} However, this year she worked for another foreman.

Just as the work in Arvin was finished, the son-in-law of Petra Fuentes, Ezekiel Perez, received a telephone call from foreman Ernesto Camacho requesting that Fuentes get in touch with him. Later, Petra's daughter Alma telephoned the foreman while her mother was on an extension line. It is the contents of this conversation which provided a source of major controversy bearing on the issue of whether Petra Fuentes and the members of her family were actually refused rehire for respondent's 1981 harvest.

44. Rudy and Yolanda Silva supervised crews which they brought to work in respondent's harvest about mid-August upon completion of the work in Arvin.

As the conversation began, Petra testified that she asked Camacho whether they were going to start the picking operation at that time. Camacho said no, but that he called to notify the family that the company was going to take photographs for employee identification cards between 9:00 and 12:00 a.m. on the following day. Alma responded that they could not possibly appear for this, since they were working in Arvin and it was to be their last day. As they worked between 4:00 a.m. and 12:00 noon in Arvin, they would not be able to present themselves on time for the photographs. Camacho essentially told them that was their problem.^{45/}

Alma herself presented a somewhat different version of this exchange. The divergences between her testimony and that of her mother are a major reason for discounting the probative value of their testimonies. Their demeanors and obvious biases against the company, discussed at greater length below, provide a further rationale for doing so. Concerning the telephone conversation with Camacho at the beginning of August, Alma, like her mother, detailed the exchange between herself and the foreman regarding the taking of photographs by the company, the family's employment and the constraints which would prevent them from appearing at the appointed time. Unlike her mother, however, she neglected to state that Camacho was asked when the harvest was to begin.^{46/}

45. As will be discussed, it appears that subsequently photographs were taken of the Fuentes for their identification cards.

46. It was not altogether surprising that Alma and her mother provided differing accounts. While Petra was called as a witness for the General Counsel as part of his case-in-chief, Alma was called, not as a corroborating witness by General Counsel, but as an adverse one by Respondent.

By contrast, when called to testify, foreman Ernesto Camacho maintained that he did in fact offer employment to the Fuentes when he telephoned them in the beginning of August. According to his testimony, two days before the harvest began in 1981, he spoke with one of respondent's employees, Ezekiel Perez. Camacho stated that he told Perez to give the Fuentes family the message that the company would take pictures for identification cards the following day, and on the day after that it would begin the harvest.^{47/} That evening Alma Fuentes called Camacho and he, according to his testimony, repeated the message. Camacho stated that Alma told him they could not go to have their pictures taken because they were working elsewhere.

Thus, while the workers maintained that they were not informed when the harvest would begin, the foreman Camacho asserted that he had, in fact, imparted this information to them.

Conflicts also developed in the accounts supplied by Petra and Alma Fuentes, and those attested to by Camacho, regarding attempts by family members to secure employment during the course of the harvest season. Petra Fuentes provided the following version of her visits to the Lucas premises and her encounters with foremen and/or supervisors.

47. When called as a witness, Perez denied that Camacho had said anything to him about the harvest beginning. However, Perez' memory was shown to be somewhat inexact when he could not recall having testified at any other ALRB hearings, despite clear references to his testimony in the ALO's decision in 5 ALRB No. 62. Also noteworthy is that Perez testified that he called his mother-in-law to relay Camacho's message, whereas Alma stated that Socorro (her sister and Ezekiel's wife) had called her with the information. Petra corroborated Perez' version.

Approximately mid-August, Petra went to see Camacho and Ray Major at the work site to inquire about employment. She asked the foreman why hadn't he called her about work. According to her testimony, the foreman replied that there were a lot of people working already and there was no order to obtain more.^{48/}

About a week or two after she had initially contacted Camacho in the fields, Petra went to the shop to speak with Ray Major. Essentially, Petra was told the same story, that the foreman had not received the order to increase the numbers of his crew, that when he did, he would call the family. Camacho never did so.^{49/} Finally, Petra Fuentes again went to the shop with Alma to speak to Ray Major, her daughter speaking to him in English. Major, according to Petra Fuentes, told her at that time to go to the foreman. If work was not obtained there, Major allegedly stated, "You know what to do, you can go to the Union, the ALRB or whatever you want."

Alma provided differing accounts of the encounters outlined above. When she and her mother met with Camacho in the fields in mid-August,^{50/} she stated that she asked the foreman why hadn't he

48. As noted, evidence established that crews started off with a minimum number of from 25 to 30 people and were augmented, as the season progressed, to upwards of approximately sixty.

49. As pointed out by Major, however, once the season has begun, it is not the foreman's responsibility to contact particular employees when an opening develops in the crew. The employee must check with the foreman in order to be hired.

50. Petra did not testify that Alma was present when she first spoke with Camacho in the fields.

called them to work, and the foreman responded that he had called when he called about the photos. Both Alma and her mother accused Camacho of lying, the mother stating that she was listening on the telephone. The foreman denied their assertions, saying that he had in fact told them.^{51/}

Like her mother, Alma testified that approximately two weeks after the above-mentioned conversation she had another conversation with Camacho where her mother again asked whether there would be a chance for work. Camacho responded that the people had to wait and see if there would be an opening. Alma and her mother thereupon left the field in order to speak with Ray Major at the shop. When they explained to Major that they were looking for work and that they had spoken with Ernie, he asked them why had they come to him. They replied because they were not called for work. Major allegedly told them to go talk to Rolando and fill out an application.^{52/} Alma stated that Major, after instructing the workers, told them that if the problem was not resolved, they knew where their problems were resolved in the past, and that was at the

51. Alma's testimony that Camacho protested the accusation that he had not told the family about work would seem to provide some corroboration for his version of the facts.

52. DiRamos, when called to testify, denied that there is any such thing as an "application." However, viewing this assertion in its most favorable light, it appears that the workers, upon the commencement of each season, give their names and social security numbers to the foremen who in turn give them to a supervisor who delivers them to the office. The office then verifies whether the employee has in fact worked for the company before.

ALRB.^{53/}

Petra testified that three or four days later, she and her children, Ricardo Jr., Alma and another daughter, Anabelle, spoke to Camacho at his home. She told the foremen that she was there again asking for work but that from what she saw, it appeared he did not want to give her any. She knew that Camacho had a lot of people for the picking. Alma denied having any further conversations with Lucas supervisors after the encounter with Major discussed above, thus failing to corroborate her mother's account of the meeting with Camacho at his home.

Camacho, by comparison, testified that his first encounter with the Fuentes during the 1981 harvest took place about two weeks after he had spoken with Alma on the telephone. Ricardo Jr., Alma, and Petra came to the Jasmine Ranch^{54/} and asked him for the pictures which the company had taken. It appeared that the Fuentes actually did present themselves to be photographed by the company on

53. Interestingly, this paraphrases somewhat a statement attributed to foreman P. Veloria by Petra Fuentes in the prior case, 7 ALRB No. 47. There, Petra testified that the foreman told her that she "likes to take a lot of reports to the labor law." Relying in no small measure upon this statement, the ALO in that case found that the Fuentes' were refused employment unlawfully as a result of Petra's testifying for the General Counsel in a Board hearing. General Counsel also had her repeat the statement Veloria made to her in 1979 as he began her direct examination, as if to reinforce its significance in her mind and prompt its later "re-phrasing" in Major's words.

Noteworthy also is the statement in the ALO's decision in 7 ALRB No. 47 that the foreman Veloria was "told by a superior employee of Respondent not to make such statements." Major is one of Veloria's superiors.

54. Alma testified that the first time she met with Camacho during the harvest it was at the Jasmine Ranch.

or about August 11. However, as no testimony appears in the record to the effect that they asked about employment at that time, it must be assumed that they did not do so.^{55/}

Further, Camacho, by omission, basically denied that the Fuentes had asked him for work on as many occasions as they had claimed. He stated that about the 20th or 25th of September, Petra, her son Ricardo, and her daughters Alma and Anabelle asked for work in the harvest. Camacho told them that the crew was already full, and that he had gotten the order from supervisor Rolando DiRamos to stop hiring. Petra Fuentes responded that it was all right if they didn't have a chance to start working in the harvest if they could all come back for pruning. When the pruning season actually commenced, Camacho spoke with Petra, Alma and Ricardo, Sr. and told them that the people who had finished the picking were first to be hired. Petra claimed that she had seniority with the company. At this point, Ray Major decided to put them back to work essentially because they were "trouble".^{56/}

Notwithstanding the inconsistent accounts detailed above, what is clear is that neither Petra, her husband Ricardo, nor her daughter Alma were hired by the respondent to work during the 1981 harvest season.

55. Petra and Alma Fuentes failed to testify about the taking of the photographs. Documentary evidence, which will be discussed in greater detail below, demonstrated that Petra and Alma Fuentes were employed at another agricultural concern on August 11.

56. According to Major, when Petra Fuentes asked to be hired for the pruning, and was told that she had no preferential right to be hired for the 1982 pruning since she had not completed the previous harvest, the worker stated "[T]his wouldn't be the first time [she would demand a job] and she'd do it again."

b. Analysis and Conclusions

Even the most superficial reading of the foregoing factual exposition would indicate that the testimony is hopelessly in conflict on the issue of the Fuentes' 1981 harvest employment for respondent. While the demeanor of Ernesto Camacho and the inconsistencies inherent in much of his testimony^{57/} would indicate that a great deal of his presentation is not deserving of credence, I find that the accounts provided by Petra and Alma Fuentes were not credible, and where they conflict with those provided by Camacho, I am constrained to discount the probative force of the testimony of the alleged discriminatees. In short, I find, contrary to their testimony, that they were informed of the commencement of the 1981 harvest for the Camacho crew.

The record is replete with support for disbelieving assertions made by Petra and Alma Fuentes concerning their attempts to secure employment in the Camacho crew for the 1981 harvest season. Alma displayed an open hostility towards the attorney for the company, as did her mother. These feeling are not difficult to understand, given the long history of conflict between the family and the company, as embodied by this particular representative. While I am unable to characterize their participation in the proceedings, like respondent's counsel, as motivated by a calculated desire to "reap a financial windfall," it remains that their testimonies were colored to such an extent by their biases as to

57. These matters will be treated in greater detail in the discussion regarding alleged discrimination involving Gilberto and Catalina Baez.

render them inherently unbelievable.^{58/}

Furthermore, and perhaps of greater significance in this credibility determination, was the damaging portion of Alma Fuentes' testimony elicited by counsel for respondent wherein she initially denied that she had any employment when she asked for a job with the respondent.^{59/} Respondent's representative thereupon introduced records from Mid-State Horticultural Company which showed that Alma and Petra Fuentes did in fact work for that agricultural employer on numerous days throughout the respondent's harvest season. Alma Fuentes later attempted to explain her testimony by stating that the work at the respondent's was much steadier and would net a greater

58. By way of example, the following exchanges occurred when Alma Fuentes was being examined by Mr. Coady:

Q: (By Mr. Coady) Ms. Fuentes, did you work at El Rancho Farms during the summer of 1981?

A. (By Ms. A. Fuentes): Yes, I worked but I don't think that's any of his business whether I worked or not.

* * *

Q: Do you remember the date when you stopped working at El Rancho Farms?

A. No, because I don't have the calendar attached to me.

* * *

Q: Where were you when you had the telephone conversation . . . ?

A. At home.

Q. Where is your home?

A. Well, it was to be in town.

59. Likewise, Petra Fuentes initially attempted to deny that she was working when respondent's harvest season was in progress.

amount. However, Alma did not freely admit that she worked at Mid-State, but instead stated such only after being rehabilitated on the matter by the counsel for the General Counsel. Alma made the further assertion that when she worked in the harvest for the respondent, she was employed for three and one-half months, for seven days a week. Such accounts were wholly unsupported, and displayed Alma's penchant for distorting reality and/or concealing the truth.

The payroll records from Mid-State demonstrated that both Petra and Alma Fuentes were working there when Camacho began employing his people for the 1981 harvest. Specifically, the records show that: both Alma and Petra were recalled to work there on July 28, and both requested that they be excused from reporting and be allowed to remain at other employment until August 6.^{60/} They further evince that Petra worked forty-seven hours in the six days from August 10 through August 15; thirty-five and one-half hours from August 17 to August 21; one full day on August 24 after which she was laid off,^{61/} only to return to Mid-State to work for three days in each of the weeks ending September 5 and September 12, full weeks for the ensuing two weeks, and four days in the week ending October 3, with employment became more sporadic in the remainder of that month. Alma, beginning August 6, worked full-time for Mid-State until August 24, when like her mother, she experienced

60. The Fuentes were employed by El Rancho Farms until that date.

61. Her time card bears the stamp "lack of work" for the days following the 24th.

a lack of work. She resumed employment with Mid-State in September in the same pattern as did her mother.

I am unable, given the obvious bias against the company harbored by these witnesses, to attach a charitable interpretation to their remarks to the effect that they were "not working" when they requested employment from Camacho.^{62/} While the witnesses could obviously not be in two places at once and thus technically, not be working anywhere at the exact hour that they visited the foreman, I cannot lend this all-too-literal interpretation to their responses. Rather, it appears that their testimony on this particular bordered on dissimulation.

It greatly strains credulity that an employer would be so obstinate and so foolhardy that it would incur the risk of unlawfully discriminating against the same group of its employees for three consecutive years. Yet charges were filed by Petra Fuentes in 1979, 1980 and 1981 (the instant matter) with the expectation that this respondent's conduct towards her and the members of her family should be viewed in this very light. Having been found in violation of the Act for refusing to rehire the Fuentes for the 1979 harvest, General Counsel contends that this company still seeks to perpetuate its discriminatory handling of the tenure of members of the Fuentes family by refusing to rehire them for the 1981 harvest. Despite the well documented anti-Union attitude of this respondent, I cannot, on the basis of this record,

62. I find that the first time they asked Camacho directly for work was around August 15, in conformity with the Fuentes' testimony ("mid-August") and Camacho's ("about two weeks" after his telephone conversation with them).

find in favor of General Counsel's position on this issue, as it appears that despite the denials by the alleged discriminatees, they were aware of the commencement of respondent's harvest, but chose not to report there for work.

Petra and Alma Fuentes are experienced grape workers and knew or should have known when the harvest at respondent would present employment opportunities for them. Petra had worked in respondent's harvests since 1975. They had relatives, Ezekiel and Socorro Perez, who worked for the company in the 1981 harvest, and who were in a position to inform them that certain crews had in fact begun working. They were not operating in a vacuum. Couple these facts with the notation in the Mid-State personnel records that the Fuentes' intended to return there when their other employment ended on August 6, the conclusion is virtually inescapable that the Fuentes' opted for work at Mid-State rather than at respondent's. They only sought work at the company when Mid-State was experiencing slack periods, as it did towards both the end of August and the end of September.

Petra, the year before, had chosen to work at Mid-State since her two minor sons needed an adult to work with them to be employed. Because of this, she obtained a written leave of absence from respondent two days after she had begun working in its harvest. The minors themselves, Marco Antonio and Juan, also worked at Mid-State in 1981. Unless they were twins, both of them could not reach majority in a year. Petra may have been under a similar constraint to work with them in 1981, or at minimum she may simply have preferred to work at Mid-State with the number of the people

who did so from her own family, including Alma, Ricardo Jr., Marco Antonio, Juan and Anabel.

While, as previously noted, I did not find Camacho to be a very credible witness, at all events, it seems more likely than not that Camacho did, in fact, inform the Fuentes' of the impending harvest, and they chose not to report when it began. Given the Fuentes' experience with this company and others, it would appear unlikely that a foreman would be calling them for the sole purpose of requesting that their photographs be taken at a time when the harvest season had just begun. Camacho himself stated that a picture was needed in order to begin work. Surely the company did not need pictures of those whom it did not wish to have as employees. Stated in another way, why would the company bother to ask to photograph those whom it had no intention of hiring or even bother to request that these individuals present themselves at its premises? The fact that the family did appear to have their pictures taken indicates that they felt the act was somehow related to their employment and was important enough to attend to. Yet, the record contains no reference to the Fuentes' requesting employment when they were on respondent's premises.^{63/} As previously noted, therefore, I do not credit Petra's assertion that she asked Camacho about work when she and her daughter telephoned him on August 4, and he told them to have their photographs taken, but do credit his

63. General Counsel failed to exact any details regarding the taking of the Fuentes' pictures, and further did not link this act to one of their requests for employment. The whole incident was glossed over, from which a negative inference may be drawn, to wit, that these workers did not request work, or even attempt to speak with Camacho, on the date that their pictures were taken.

assertion that he informed them when work would start.

Regarding Ricardo Fuentes' Sr., the record contains no reference to his particular efforts to obtain work during respondent's 1981 harvest. Neither his wife nor his daughter mentioned him in connection with their efforts to be hired for that season. He himself did not choose to testify. The only direct allusion to him was that on occasion he drove to work with his wife and other members of his family, and testimony that he served as a Union observer in the election. There was no indication that he, specifically, even desired to work for respondent during the harvest.^{64/} To the contrary, there is evidence that he was employed elsewhere during the period. As noted in George Lucas (1979) 5 ALRB No. 62, "to establish a discriminatory refusal to rehire, the General Counsel must ordinarily show that an alleged discriminatee made a proper application." I specifically find that this element concerning Ricardo Sr. was lacking.

It is axiomatic that the General Counsel has the burden of proving, in the case of a refusal to re-hire, that work was available at a time when the application for employment was made. J.R. Norton (1982) 8 ALRB No. 76. This Board has recognized a general exception to the "availability" requirement: where an employer "has a practice or policy of recalling, or giving priority in hiring employees," the employee need only make proper application and work availability, at the time of the application, need not be shown. Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98. However, the

64. Ricardo Fuentes was present on several occasions during the course of the hearing but was not called to testify.

evidence in the instant case conclusively demonstrated that once a season had commenced, company policy and practice dictated that the foreman was not responsible for recalling workers from "applications" to augment his crew. Rather, the worker was obliged to persist in presenting him/herself in the hope that work would be available on that particular occasion, and that he/she would be hired. Given the inconsistencies in the testimonies of both Petra and Alma Fuentes, and the general lack of credence which could be attached to either, it has not been adequately demonstrated that Camacho was hiring for his crew on the dates when they asked him for work.

Records indicate that employees were added to Camacho's crew after August 6 (the first day) on August 13, 15, 19, 20, 21, 23, 27, 31, and September 8 and 10. August 13 is the only date when Camacho added more than two employees to his crew. Realizing that it is a difficult burden to expect agricultural employees to recall with exactitude the specific days that they asked for work, nonetheless, the vague references by Alma and Petra, coupled with their lack of candor and the fact that they were both employed by Mid-State during this period, militates against a finding that they definitively established that they applied for work when it was available.

In summary, it appears that the Fuentes pursued opportunities at other agricultural employers before presenting themselves at the respondent's. They expected to immediately be put

to work, respondent's hiring requirements notwithstanding.^{65/} They were not, however, "refused" rehire. Accordingly, it is recommended that this allegation be dismissed.

65. This attitude was reflected in the comment noted above, by Petra to Major at the beginning of the 1982 pruning season, when despite not having finished the previous (harvest) season, she felt that she was entitled to employment.

5. Paragraph 11; Failure to Rehire Armando Orozco

a. Union Activities

In a situation not altogether dissimilar from that of Petra Fuentes and the members of her family, General Counsel alleged that Armando Orozco was not hired for respondent's 1981 harvest because he had engaged in protected, concerted activities. Like the Fuentes', Orozco supported the Union; claimed not to have been informed of the beginning of the harvest at the time he was told that respondent was taking identification pictures of its employees/asserted that he had been refused rehire by respondent for its harvest; and worked at another agricultural employer during a significant portion of that season.

Orozco began working for the respondent in 1974, and with the exception of 1976 and 1977, has worked there every year since. In the past three years he has worked in the crew of foreman Ramon Solano Hernandez.

Orozco claimed that he was a "member" of the UFW. About one week and a half before the election, Orozco spoke to foreman Hernandez regarding the Union. Hernandez asked Orozco, according to the worker's testimony, how he saw the Union. Orozco responded that it would be better for the people to have the Union. Hernandez stated that the Chavez Union had been crooked, that money had to be paid before people were dispatched for jobs, that sometimes workers were sent to ranches other than ones that they had worked for in the past. Orozco replied that when the Teamsters were in charge^{66/} "no

66. Respondent was under Teamster contract from 1973-1975.

one accepted them," that every week "they would take money from us," that "they stole from us": if "Chavez was crooked, then the Teamsters were as well." Orozco stated that he wanted to see whether this Union would be better, or would be more to their advantage.

Orozco signed an authorization card during a lunch hour in May 1981. He stated that at that time he was fairly close to his foreman, who was seated in a pickup truck, looking in his direction. He also testified that he wore a Union button on that same date, but neglected to mention whether the button could have been seen on his person by the foreman.

On the basis of the foregoing,^{67/} I conclude that Orozco had participated in protected, concerted activities, and respondent, through its foreman Ramon Hernandez, was aware of that participation.^{68/}

67. General Counsel elicited additional testimony from Orozco wherein he described an incident which occurred while he was working with a company truck on which another employee had placed a Union bumper sticker. Supervisor Eliseo Herrerra noticed the bumper sticker and cautioned Orozco and others not to allow anyone to place stickers on the truck. I find that this incident, in and of itself, is inconclusive in regard to Orozco's Union activities. Orozco also stated that he participated along with the members of his crew in a group request for a pay raise. However, nothing in his account of that incident created the impression that his particular participation was noteworthy.

68. Respondent argued that it did not possess this knowledge, principally basing this contention on the denials by foreman Hernandez that he discussed the Union with Orozco or was aware that Orozco signed an authorization card. While Orozco was something less than a Union "activist," I credit his assertions regarding divulging his Union sympathies to the foreman.

b. Attempts to Secure Employment for the 1981 Harvest; The Discriminatee's Version

Orozco testified as follows regarding his efforts to be hired during the 1981 harvest. In the beginning of August^{69/} the wife of foreman Ramon Hernandez, Camila, telephoned the worker to request that he go to the company offices to have his picture taken. In the previous season it was Camila who had called Orozco for work in the suckering operation. Orozco responded, "What do they want pictures for?" He told Camila that he wanted to work, and asked when the company was going to start the harvest. Camila, he stated, replied that the harvest would start in fifteen days.

Subsequently, Orozco went directly to his foreman to see whether or not he could obtain work, since he had found out from fellow worker Juvencio Gudinez that the crew had already begun in the harvest. At that time the foreman told him that he needed to speak with supervisor Rolando DiRamos to verify the worker's seniority.^{70/} Orozco then went to the office, where he accosted the supervisor. DiRamos told him that no work was available, that Orozco had to talk directly with the foreman to secure employment. Since he had already been to see Hernandez, Orozco apparently felt

69. Orozco testified that this conversation took place around the fifth of August.

70. Company personnel, including Ray Major and Hernandez, stated that before a worker could be employed his name and social security number had to be submitted by the hiring foreman to the office in order to ascertain whether the person had previously worked for the company.

it was unnecessary to go back to him that day.^{71/}

Orozco stated that the foregoing transpired on a Monday. On the following Friday, Orozco went back to see whether or not Hernandez had in fact checked his seniority. At that time, he was unable to get any information from the foreman other than that Hernandez had not received his order from the supervisor to hire more people.^{72/} Following this exchange, Orozco went to the shop, where he waited for the regularly-held supervisor's meeting to end. When the meeting concluded, Orozco spoke to supervisor Jose Becerra, and asked him what was happening, why didn't they want to give him a job. Becerra took Orozco over to Ramon Hernandez and confronted the foreman directly, asking why Orozco had not been hired. The foreman stated that he had in fact been called. Orozco accused Hernandez of knowledge that he hadn't been called, and stated that the foreman shouldn't be a liar.^{73/} Hernandez responded that he had told DiRamos about the situation, to which Becerra replied that he didn't want any problems, that the worker should be given a job.

71. Interestingly, Orozco testified that after he told DiRamos that Hernandez had not called him to work, the supervisor told him: "'Well, I don't pay the foreman for him to call you on the phone.' That he didn't pay him to go to my house to inform me. He didn't pay tires for the car." Thus, the worker underscored the fact that it was the employee's responsibility to continually check for openings in the crew, not the foreman's obligation to apprise the worker of same.

72. The reference is undoubtedly to the company practice of the supervisor ordering the foreman to increase the size of his/her crew after a season has begun.

73. This particular recitation is reminiscent of one provided by Petra Fuentes, supra.

About three days later, Orozco again confronted DiRamos in the shop and asked what happened to his job. The supervisor responded that Hernandez had not "given me any paper for me to give an order." Whereupon, Orozco stated that Hernandez had told him that he had given DiRamos "the paper." There followed an exchange between the worker and the supervisor in which DiRamos maintained that the foreman was lying to the worker, that he already gave him the order to put the worker back, that the two would go and speak to Hernandez to find out who was lying. Orozco was told where Hernandez and his crew were located, and that DiRamos would meet him there to confront the foreman. Orozco went to where the crew was working, and informed Hernandez DiRamos was due to arrive. The foreman replied that he had already given DiRamos the paper which would enable Orozco to return to work. DiRamos, however, failed to appear that day out at the work site.^{74/}

Despite repeated attempts by the worker, including entreaties to Ray Major to obtain employment, and promises by Major that he would be working within a day or two, Orozco did not get a job in the harvest. He did, however, resume employment with respondent in the pruning. Essentially, then, Orozco's characterization of his attempts to secure employment during the harvest season may be summed up by stating that he maintained that he was ignorant of the actual date when the Hernandez crew began working in the harvest, that he checked for work on several occasions, but was given the run-around by various supervisors and

74. No corroboration was provided for Orozco's assertion that he visited the work site on that occasion.

foremen, and was never actually hired.

c. Respondent's Version

Camila Hernandez, the wife of Ramon and the "second" or foreman's assistant in his crew, testified that about three days prior to the commencement of the 1981 harvest for the crew she spoke with Orozco on the telephone. She informed the worker that he had to have his photograph taken because the season was about to start. Orozco responded, according to Camilla, that she should call him when the work was going to start, not just for his picture.^{75/} Camila replied that if he did not want to have his photo taken, that was his problem.

Camila also testified to a subsequent conversation on the day prior to the beginning of the harvest where she announced to Orozco that work was going to commence. Orozco allegedly responded the he could not start right then, that he was working at another place which was closer, that perhaps he would begin later.^{76/}

Camila stated that in the first few days after the crew began working in the harvest she spoke with crew members Cruz Romero and Juvencio Gudinez regarding Orozco's absence. She asked them what had happened with Armando. They replied that they did not know.

75. Camila's recitation of this particular parallels that supplied by Orozco himself.

76. Orozco stated when he initially testified that he "never" received a call during that time asking him to report to work. On rebuttal, Orozco asserted that he only received one call from the foreman's wife.

Gudinez was called as a witness by General Counsel on rebuttal. He did not directly contradict Camila's statement that she had spoken to him regarding Orozco. Gudinez merely maintained that she asked him if they had seen Orozco. Camila herself did not testify to much more, although she did say that the two workers agreed that they would notify Orozco that she had spoken to them regarding him.^{77/}

Camila noted that Orozco did not report for work for the first three days that Hernandez' crew was employed during the harvest.^{78/} Approximately 15 days after work began, Camilla spoke with Orozco in person, who asked her if there was a chance for him to begin working. She told him that at the present time there were no openings, but that he should keep checking. However, there were a lot of people "ahead of him" and that no promises regarding his employment could be made.

Camila testified that Orozco again attempted to find work about one week later, and was told once more that there were no openings. She stated that following this last encounter, she did not see Orozco until the pruning season, when he asked for work and

77. Gudinez was an older gentleman who might have had a somewhat imperfect recollection of events. He displayed a certain amount of confusion regarding responses to counsels' questions. Orozco himself maintained that Gudinez told him that the Hernandez crew had already begun working. Assuming that Camila's inquiry about Orozco pre-dated Gudinez' notification that the crew started, it would seem logical that in that context Gudinez might also mention to Orozco that Camila had asked about him.

78. As recited above, according to company policy the respondent holds positions open for workers for three days following the commencement of any given season. After such time the slots which would have been occupied by workers eligible to be hired on a preferential basis are filled by other employees.

she gave it to him.

When Ramon Solano Hernandez himself was called as a witness, he testified that he ordered his wife to call Orozco regarding the photographs which, according to him, had to be taken before work began: the sooner the photographs were taken, the sooner work would commence. He also stated that he ordered his wife to recall Orozco for work before his crew started in the harvest.

Hernandez corroborated his wife's testimony regarding inquiries to workers concerning Orozco's absence during the first and second days of the picking season. According to Hernandez, when he asked his wife what happened with Armando, she told him that he was working "close by there." The foreman testified that he also told Juvencio Gudinez and Cruz Romero to tell Orozco that work was beginning. They responded, "O.K.," that they would tell him. Notably, Gudinez' testimony regarding the foreman's remarks paralleled that which he gave when questioned about Camila's inquiries about Orozco, i.e., that the foreman merely asked him whether he had seen Armando. While he denied that the foreman asked him to contact Orozco and tell him to report to work for the harvest, Gudinez had, in fact, done this for the foreman in the prior pruning season.

Hernandez testified further as to two conversations he had with Orozco regarding the worker's efforts to obtain employment during the course of the picking season. The first of these occurred about two weeks after he had spoken to Gudinez about Orozco. Each time Orozco would present himself at the field and ask whether there was a chance to be hired. Each time the foreman would

respond that there were no openings, that he should check back in three or four days. Hernandez also noted that the first time Orozco appeared, the foreman told him that he had "several other persons whose applications were ahead of" his.

Hernandez testified that about a week and a half after Orozco had first asked him for work, he was summoned by Ray Major to the company shop. Present on that occasion were Orozco, Rolando DiRamos and foreman Eliseo Herrerra, who interpreted. Major was angry that people seeking employment were being sent to him. He asked the foreman Hernandez whether he was responsible for sending Orozco to the office. Hernandez denied sending anyone to him. Major proclaimed that he was not the person who hired people. He thereupon asked Hernandez whether he had already hired the five people that he had been authorized to hire. When Hernandez responded in the negative, Major told Orozco to report to the fields.

Major and DiRamos both corroborated Hernandez' account of this discussion. According to all of the company witnesses, the next day Orozco did not report for work as expected, and was not seen again following this incident until the 1982 pruning season.^{79/}

79. Orozco himself basically corroborated Hernandez' account of the meeting with respondent's supervisors. He stated that on one occasion he did go to the office to talk to Ray Major about work, that Eliseo Herrerra was present at the time, that Hernandez was ordered to be brought to the office and that the order had been given to hire additional people. Orozco testified, however, that he was assured that on the next day or the day following he would begin work, that he should not worry, that he would get a job. Contrary to Hernandez' account, however, Orozco maintained that he did return to seek work, but was never hired.

Respondent introduced payroll records from Tex-Cal Land Management which demonstrated that Orozco applied for employment there on July 27, worked full time for that employer between July 28 and August 21, was (presumably) laid off until September 9, and worked intermittently^{80/} for that concern in September and October. Thus, Orozco was working for that employer when Camila contacted him on the telephone prior to the employment of the Hernandez crew. Orozco also placed the date of his first visit to respondent's premises to request employment^{81/} around August 20.^{82/} This would seem to coincide with his layoff at Tex-Cal, which occurred on August 21.

A summary of the Hernandez' crew payroll records was preferred by respondent. The summary indicated that the crew began working as a unit on August 10, and that additional employees were hired on August 12, 17, 21, 22 and September 19. Thus, it would appear that employees had been hired at or around at least two dates

80. Specifically, the records show that Orozco worked full days (7 to 8 hours) on September 9, 10, 11, 14, 15, 16, 28, 29, 30; on September 17 he worked 2.5 hours, and on September 20 he was apparently paid on a per-job rather than hourly basis. Orozco's job function changed while employed at Tex-Cal, as shown by the differing job codes and rates of pay appearing on the payroll records. Orozco worked on a fairly regular basis for Tex-Cal between October 1 and October 9, then again from October 21 through the end of that month.

81. Orozco stated that on two occasions he did visit the company offices in the beginning of August for the purpose of having his picture taken, but was told that the person who was performing that function was ill. He did not testify that he inquired about employment at such times.

82. Hernandez concurred as to the date.

when Orozco sought employment.^{83/} However, Hernandez explained that others had applied for openings in the crew prior to Orozco and were entitled to jobs before he could be hired. The assertion that other workers had applied for jobs previous to Orozco appears logical in light of the fact that he did not express any interest in working for respondent until about August 20, some ten days after the crew had actually begun working.

d. Analysis and Conclusions

As a reading of the recitations above clearly indicates, a fundamental conflict arose between the testimony of the alleged discriminatee and that of witnesses for the respondent. While Orozco's demeanor appeared to indicate that he was testifying truthfully,^{84/} his denial of certain key facts during the course of his cross-examination leads to the opposite conclusion. Orozco stated unequivocally that he was not working -- he was "stopped" or laid off at Tex-Cal prior to that time -- when he spoke with Camila Hernandez, and that he did not have a job when he went to the company offices to have his picture taken. Payroll records from Tex-Cal conclusively demonstrated the falsity of such representations. This effort to conceal his true work status during the time of respondent's harvest infects the entirety of his testimony: "testimony of a witness found to be unreliable as to one

83. The summary was admitted pursuant to Evidence Code section 1509. General Counsel did not adduce any proof to controvert the representations made thereon.

84. The testimony he presented during the course of a lengthy cross-examination followed fairly consistently that which was elicited on direct. Most of his responses were given without hesitation.

issue may be disregarded as to other issues." (San Clemente Ranch, Ltd., supra.)

Further, Orozco represented that he began to work at Tex-Cal only after he had spoken with Ray Major about a job with respondent and after he began to feel that he would not be hired. The facts indicate otherwise. The worker testified that he spoke with Major and Hernandez about one week after he had filed the unfair labor practice charge which complained of his refusal to be rehired. Since the charge was filed on September 11, the Major conversation would have to have taken place around September 18. Tex-Cal's records, on the other hand, underscore that Orozco sought work with respondent when employment availability there slackened, not the other way around. As noted above, Orozco worked for Tex-Cal on September 9, 10, 11, 14, 15, 16, 17 and 20, as well as being employed there steadily in the first several weeks that the Hernandez crew worked in the harvest.

Accordingly, I discredit Orozco's assertion that Camila did not notify him that her husband's crew was to begin working in the harvest, and his assertion that he returned to respondent's premises after Major had promised him employment, only to be denied it once more^{85/}

85. It seems somewhat anomalous that after Orozco had received an apparently definite promise of work that he would not again protest the repeated refusal of Hernandez to hire him, particularly when he had persisted in doing so without such a commitment in the weeks previous.

Once all of the testimony^{86/} regarding the hiring or lack of hiring of this particular worker is distilled to its barest essence, it appears that this worker was told about the commencement of work, that he was at least informed that the foreman had asked about him,^{87/} and that the worker chose not to report to the respondent for employment, but opted instead to continue working for Tex-Cal. When he finally did report for work with the respondent he had to wait for an opening and take his place in line behind other workers who had previously sought employment. Further, according to the credited testimony, when Orozco was eventually offered a job, he declined to accept it, for reasons best known to himself.

Orozco, not unlike the Fuentes', apparently expected to be hired for work in respondent's harvest whenever he chose to present

86. Ramon Hernandez' evasive and abbreviated statements regarding his knowledge of the 1981 Union organizational campaign detracted from the credence which one might attach to the entirety of his testimony. However, I specifically credit the critical facts, which his testimony substantiated, attested to by his wife regarding the telephone calls she made to Orozco, and those supplied by Major and DiRamos regarding the offer of employment to the worker, as these witnesses appeared to be essentially truthful. Major, DiRamos, and Hernandez mutually corroborated each others' accounts of the meeting in the shop with Orozco.

One of the major difficulties presented by this case was that I found witnesses called by both sides to be, in many instances, less than candid. Notwithstanding any of the foregoing credibility resolutions, it must be borne in mind that General Counsel has the burden of proving his case by a preponderance of the evidence (ALRA Section 1160.3; see, e.g., Lawrence Scarrone, *supra*.) Where neither affirmative testimony nor its refutation is particularly credible, General Counsel has obviously not met his burden of proof.

87. I infer that worker Gudinez mentioned this to Orozco when he told him that work in the Hernandez crew had begun.

himself, and to avail himself of opportunities which might be presented by respondent to fill in the employment gaps created by slack periods at another agricultural employer. Company policy dictated otherwise. Therefore, it cannot be said that respondent "refused to rehire" Orozco, as it clearly offered to him the chance to work during the harvest.^{88/}

Accordingly, it is recommended that this allegation be dismissed.

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88. Parenthetically, Orozco was employed by respondent in the subsequent pruning season.

6. Paragraph 12; Discharges of Gilberto and Catalina Baez

On September 23 at about 11:00 a.m., while the crew of Ernesto Camacho was engaged-in harvesting operations, several police officers arrived at the work site. They went over to a vehicle owned by worker Gilberto Baez, removed a firearm from it, and summoned Baez from the fields. Following his apprehension, a large proportion of the crew stopped working and confronted the foreman, accusing him of calling the police and having Gilberto arrested. During the course of this confrontation, the wife of Gilberto Baez, Catalina, exchanged words with the foreman.

The following day, Gilberto and Catalina Baez were discharged by the respondent. The reasons advanced for the terminations were that Gilberto allegedly violated a company rule against bringing firearms to the field, and Catalina allegedly "threatened" a foreman. General Counsel contended that these discharges were discriminatory, in violation of sections 1153(a) and (c) of the Act.

Gilberto Baez had been chosen by the members of his crew after the election to be their Union representative. From time to time, pursuant to this responsibility, he would distribute Union literature. Gilberto also took it upon himself to remedy particular working conditions that he felt needed attention, such as cleaning the on-site restrooms and moving the water can. Prior to the election, Gilberto assisted the Union organizational effort by passing out leaflets. His wife, Catalina, aided him in this capacity, and testified that she continually wore a Union button at work during those times. In addition, she stated that she rode to

work with her husband in a vehicle which was emblazoned with a large sign proclaiming support for the Union. Thus, the fact that Gilberto and Catalina Baez had engaged in Union activities, and were openly in favor of the Union, was well established.^{89/}

Regarding the events surrounding the terminations themselves, worker Teresa Bazaldua testified that on the morning of September 23, when the bulk of the Camacho crew perceived that Gilberto Baez was being taken out of the fields by police officers, as noted above, they left their work and came out of the rows.^{90/} The workers demanded that Camacho tell them who was responsible for Gilbert's arrest. Several workers questioned Camacho about the incident, including Catalina Baez, Gilberto's brother Arnulfo, and Arnulfo's wife Delores. Ricardo Bazaldua, Teresa's husband, stated that he told Camacho not to make a fool of himself, and accused the foreman of being the one who called the police. Camacho's answer to all of these queries and accusations was consistent: he denied that the police were called by him, and stated in response that the company was "very big."

After Camacho denied that he had called the police, Ricardo and Teresa Bazaldua, as well as Catalina Baez, provided mutually corroborative testimonies regarding Ms. Baez' confrontation with and remarks to Camacho. Catalina, according to the Bazaldua's version,

89. Respondent did not refute any of the assertions in this regard made by General Counsel's witnesses.

90. Between ten and twelve people in the crew of forty-five remained at their work stations.

stated that when Gilberto got out of jail things would get "fixed" at the Union. Catalina Baez herself testified that prior to leaving for the Union office, she told the foreman that she would "take care" of the problem when Gilberto got out. Camacho thereupon informed her that he would give her a warning ticket based on her behavior. She challenged the foreman to go ahead and give her the written warning. However, no such ticket was issued or received. Teresa Bazaldua, standing in close proximity to Camacho and Catalina, thereupon pushed the foreman, telling him that he was "very rude."

It appears that a very confusing scene indeed occurred on that day. However, the three worker witnesses who testified provided fairly consistent accounts of what transpired, although there were some minor conflicts concerning who exactly said what to whom.^{91/} The confusion is understandable when one considers that many of the workers were incensed at what they perceived as unfair treatment of a popular co-worker and raised multiple questions about the incident, questions they mutually directed to the foreman concerning the problem experienced by their Union representative.

After Gilberto was arrested, about thirty members of the crew accompanied Catalina Baez to "Forty Acres" or the Union office. Catalina Baez and Teresa Bazaldua testified that their purposes in going there were to see what could be done about the situation and

91. These accounts are set forth in greater detail below, as is a discussion of the respondent's position that the inconsistencies render the testimony inherently unreliable.

to obtain some form of assistance from the Union. While at the office, the workers were advised to return to work. However, upon their return to the fields, they were informed by workers that they met who had remained and who were just then leaving that the foreman had told them that there was to be no more work that day, that there were "too many problems." Thus, the entire crew did not work the remainder of that day.

On the following day, Camacho and supervisor Jose Becerra assembled the crew and informed them that Gilberto Baez had been terminated for having a firearm in his car, and that Catalina Baez was dismissed for threatening a foreman. Teresa Bazaldua thereupon challenged Camacho to fire her also because she had pushed the foreman on the previous day. Camacho declined. Upon hearing of the discipline being meted out, several workers in the crew verbally protested the company's action.

Respondent's version of the circumstances leading up to the terminations of Gilberto and Catalina Baez was provided, in principal part, by foreman Ernesto Camacho. However, for reasons which will be delineated below, I found Camacho to be an exceedingly unreliable witness, and where his testimony conflicts with that supplied by other witnesses on these issues,^{92/} it is their testimony, rather than his, which is to be credited.^{93/}

92. This determination is not inconsistent with that made regarding the "refusal" to re-hire the Fuentes, *supra*, as I concluded that their testimony was not credible and could not support a finding of a violation.

93. Even without this credibility resolution, ample foundation, as will appear, exists for concluding that Catalina and Gilberto Baez were the victims of discrimination.

Camacho testified that the day before the incidents giving rise to the terminations, he cautioned Gilberto about improper picking procedures, and actually gave to Gilberto a warning notice which Baez would not sign. Camacho stated that on the next day he saw police officers go over to Baez' pickup and also saw them remove a pistol from the vehicle.^{94/} Police officers asked whom the vehicle belonged to, then went to the row where Baez was working and took Gilberto away.

Camacho maintained that his exchange with Catalina Baez contained no reference to the Union. Rather, she just stated to him, "You're going to pay for this"; that when her husband got out of jail, they would do something about the situation; and that she told the foreman she was "going to kill him, you son-of-a-bitch." Because she threatened him, Camacho felt it necessary to terminate her. Camacho testified in addition that when Teresa Bazaldua asked him why the foreman did not fire her also, he responded that he did not fear anything from her and there would be no reason to fire her. Camacho further stated that Teresa Bazaldua did not touch or push

94. Apparently, respondent sought to make some connection between the issuance of the warning notice and Baez's appearance the next day with a firearm. In its brief, it states "Baez became irate with Camacho and initially refused to accept the warning slip. On the following day, Baez appeared at work with two firearms ..." I find no logical connection between the two incidents, and no factual basis on which to support such an inference, or more properly, innuendo. The record is silent as to whether Gilberto carried his resentment over the warning notice, if any, to the next day when he was arrested. No testimony was presented regarding any remarks that were exchanged between him and the foreman on the day when the notice was issued. Further, the question as to who "brought" the firearms to the work site is subject to serious doubt.

him.^{95/}

Camacho asserted that following the arrest of Gilberto Baez, he sent everybody home. Contrary to the testimony of several witnesses, Camacho claimed that he did not hear the word "Union" mentioned during that particular day. Yet the witnesses that testified on behalf of General Counsel^{96/} made it quite clear that prior to leaving the fields that day, they announced that they were going to attempt to straighten the Baez matter out with assistance of the Union.^{97/}

Camacho preferred some additional information which figures centrally in a finding of unlawful discrimination. He testified that after Gilberto had been arrested and a large group from the crew left the fields, he saw two members of the crew, Raul Toscana and Jorge Bravo, return. They drove rapidly into the field, stopped their vehicle, and went into one of the rows. The two then allegedly picked up yet another gun, a .357 Magnum, which Camacho maintained he had seen previously in Baez' possession. Toscano and Bravo then left the work site with it. I am not altogether

95. This detail conflicts with accounts of several witnesses who asserted that Teresa actually did shove the foreman on the day in question. Also of significance in weighing Camacho's credibility was his assertion at one point in his testimony that Catalina "struck" him. He did not repeat this claim, despite being asked repeatedly about the reasons for Catalina's termination, nor was there any corroboration provided for it.

96. Included among these were Teresa and Ricardo Bazaldua.

97. It would appear somewhat anomalous that Camacho could witness the departure en masse of the majority of his crew during the course of the work day and not have any inkling why they were leaving or where they were going.

convinced that these events took place, as no other witness was called to corroborate Camacho's account. Nonetheless, it remains that no witnesses were asked to refute Camacho's testimony on this issue. Thus, I am constrained to accept it as true.

Neither Bravo nor Toscana was disciplined for the violation of the rule which ostensibly caused the discharge of Gilberto Baez, i.e., having a gun in the fields. Later in his testimony, Camacho stated that Toscano rode to the fields with Baez in the latter's pickup. The foreman further admitted that despite the fact that it was Baez who was discharged, Camacho did not really know who had brought the gun or guns to the fields on September 23rd.^{98/}

Camacho maintained that in 1980, during pruning time, in the presence of all of the workers in his crew including Gilberto Baez, he announced that no workers were to "carry" weapons during working hours.^{99/} He stated that one of the workers was carrying a knife and that he had to announce the rule as an outgrowth of an

98. Manuel Acevedo, the arresting officer who was called to the work site that particular day, testified that he received a report from an unidentified informer that Gilberto Baez had a pistol in his possession. Acevedo then went to investigate the incident at the Lucas property. He located the Baez vehicle and found a weapon inside. He arrested Baez and charged him with possession of stolen property (apparently the weapon had a serial number which indicated that it had been stolen). After further investigation, Acevedo determined that the weapon found in Baez' car was not the weapon reported stolen. Baez was ultimately charged with having a firearm in a motor vehicle. The disposition of that case was not made apparent on the record.

99. Technically, Baez was not "carrying" a weapon. It was merely found in his vehicle.

incident involving this employee.^{100/} No other witness corroborated Camacho's assertion in this regard. However, on cross-examination, Camacho testified inconsistently that he alluded to the rule regarding weapons on several occasions to various workers, after having initially asserted that he mentioned such a rule only once.

On re-direct, Camacho again changed his testimony, claiming that he told the workers in early 1981 of the company prohibition against carrying weapons in the fields. Furthermore, Camacho admitted that he himself carried a firearm on occasion, and that the workers knew that he did, since they asked him about it when the sheriff came to arrest Gilberto. Camacho also admitted that on the day of Gilberto's arrest several workers challenged him to check their cars to see whether or not they contained weapons, and that he refrained.

Given the inconsistent accounts provided by Camacho, the lack of corroboration for his assertions, and his failure to act upon the insistence by several workers that they check their cars,^{101/} it is concluded that Camacho's claim that he announced a rule to his crew regarding weapons is pure fabrication.

An employer has the right to make decisions and take actions regarding employee tenure, absent a showing that such decisions were based on employee participation in protected

100. The worker, parenthetically, was not fired by Camacho for carrying a knife since, in the foreman's words, "Nobody knows what's the rule. That's the first time that I gave to everybody those rules about weapons."

101. It may be inferred that if the rule were announced that people would not so willingly expose themselves to the risk of termination.

activity, or had an adverse effect on the exercise of employee rights. Tejon Agricultural Partners (1982) 8 ALRB No. 92; see also Rod McLellan Co. (1977) 3 ALRB No. 71. While the plain logic of the rule pertaining to weapons is or should be self-apparent, and the possession of deadly weapons by workers at the workplace is a condition truly to be deplored, I find that at no time did the company formally announce a rule that it was prohibited for workers to carry weapons in their vehicles, and that such conduct might lead to their immediate discharge. To the contrary, Major admitted that from time to time supervisors and/or foremen might carry weapons in their cars to "shoot rabbits,"^{102/} thus logically giving workers the impression that such conduct might be permissible. Camacho himself stated that from time to time he had a firearm in his possession.

The ex post facto enunciation of the particular prohibition against firearms points to the conclusion that Gilberto Baez was discharged for unlawful anti-union reasons. No testimony was presented to the effect that Baez had ever threatened anybody with this weapon, had brandished it in the presence of employees or supervisors, or in fact had done anything with it which would present either an imminent threat to anyone at the work place or at minimum impart the knowledge that he was engaging in this form of objectionable conduct. Baez was terminated for a type of behavior where there had been no prior indication by the company that such conduct would be a cause for discharge. Plainly, had the company announced the rule in advance, Baez would disobey the rule at his

102. Query whether a handgun is a useful instrument for this purpose.

peril. However, not having the opportunity to either comply with or disobey the rule, Baez could not be held accountable for acting contrary to company "policy," a policy which had never been enunciated. Employee tenure of a union activist which is affected by the evocation of a previously unannounced rule provides evidence of discrimination (Nishi Greenhouse, supra, cf. Golden Valley Farming (1979) 4 ALRB No. 79).

Additional evidence of discrimination may be inferred from Camacho's failure to investigate who was specifically responsible for bringing the firearms to the fields. (See Sunnyside Nurseries (1980) 6 ALRB No. 52.) Although Camacho maintained that he recognized one of the weapons in question as belonging to Baez, he admitted that Baez rode to work with several employees, and that he did not really know who had brought the gun or guns to the field.

Significant also was the "disparate treatment" which Baez received when compared to the lack of any disciplinary measures taken against employees Bravo and Toscano. (Tejon Agricultural Partners, supra; Royal Packing, supra; cf. Tenneco West, 8 ALRB No. 59.) Despite Camacho's seeing them actually carry a weapon from the fields, nothing was done about their tenure. Camacho all-too-readily inferred that Baez was responsible for all the improprieties, without investigation or verification. His assumption that Baez was at the root of the misconduct was based not on fact, but on surmise which, due to Baez's participation in protected, concerted activities, gives rise to the inference that it

was unlawfully motivated.^{103/}

Regarding the discharge of Catalina Baez, I find that this discharge, as well, was discriminatorily motivated. Camacho was the only witness to testify as to her statement that she was going to "kill him." Respondent called two crew members, Jose Jaraquaro and Martha Badilla, in an attempt to bolster Camacho's version of the confrontation with Catalina Baez on the day of Gilberto's arrest. Neither of them substantiated the foreman's recitation. While Jaraquaro stated that he did not hear Catalina mention the Union in her exchange with Camacho or use bad words such as "cabron",^{104/} the weight of Jaraquaro's testimony was diminished somewhat by his admission that he did not hear all that was said during that day. However, Jaraquaro did testify that he heard Catalina say to Camacho words to the effect that did he think her husband would remain "with his arms crossed," that the foreman "would be sorry" for what he had done. Jaraquaro also admitted that he did not go with the workers that day to the Union office.

Similarly, Martha Badilla, the second foreman in the crew, stated that she did not hear Catalina Baez say anything about the Union in her exchange with Camacho. Badilla also maintained that 4

103. Camacho denied that he could tell "what was in Gilberto Baez' heart" regarding the Union. In this instance, it could truthfully be said that Baez wore his heart on his sleeve, openly demonstrating preference for the Union, as per above, by participating in organizational activities and seeing to it personally that certain working conditions be attended to. Camacho's statement in this regard is indicative of his general lack of candor.

104. The word can be loosely translated to mean "son-of-a-bitch."

or 5 years ago in the crew of Delores Mendoza a rule was announced regarding the possession of firearms in the fields.

Badilla did not impress me as a particularly credible witness. She seemed to tailor her testimony to the particular situation. Assertions made by her were totally uncorroborated by any other witness save for portions of her testimony which referred to statements made by Catalina Baez. Incredibly, Badilla stated that Camacho told the crew on several occasions about the rule concerning firearms. Camacho himself did not even testify consistently as to this assertion, despite his being asked. Badilla stated that two weeks before Baez was fired, Camacho informed her of the rule, but that not all of the crew was present at the time. She denied hearing the workers accuse Camacho of calling the police on Baez, whereas Camacho himself admitted that many of the workers expressed that notion on the day in question, and the statement was a prominent feature of the testimony of several witnesses who provided accounts of events on that day. Ultimately, Badilla admitted she did not hear everything that was said on that particular day.

Respondent analyzed in depth the testimony of General Counsel's witnesses as to what Catalina Baez actually said to Camacho after her husband was taken by the police. Catalina initially stated that she informed Camacho: "This is not going to say this way. We're going to do something. We're going to fix this with the Union." Respondent emphasized that neither Catalina's declaration written the day after the event, nor a portion of the

testimony provided by Teresa Bazaldua,^{105/} nor the testimony of Ricardo Bazaldua,^{106/} corroborated Catalina's assertion that she was going to "fix this with the Union." Nevertheless, owing to the lack of credence which I attached to the testimony of Camacho and Badilla, and the qualifying statements by Juaraquaro and Badilla that they did not hear "everything" that was said that day, I credit the testimony of Catalina Baez and Teresa and Ricardo Bazaldua on this issue, to the effect that Camacho was told that the Union would become involved in correcting the situation.

Notwithstanding the foregoing credibility resolution, assuming arguendo, that the reference to the Union was not made by Catalina Baez, an ample basis exists for finding that she was discharged not for "threatening a foreman," but for unlawful, discriminatory reasons. No witness corroborated Camacho's assertion

105. When first asked by General Counsel about Catalina's remarks, Teresa did state, corroborating Catalina's testimony, that "We're going to get this fixed at the Union." However, upon being asked to reiterate the statement, she added, "When Gilberto comes out, . . . we're going to get this fixed at the Union." When General Counsel asked again about the conversation, Teresa provided a somewhat different version: "She just told him . . . 'When he comes out, we are going to take care of his. This will not remain like this.'" Only after a further leading question did Teresa add the detail about going to the Union. I find these all to be distinctions without a difference. The problem herein lies more with the questioner than with the answers. Being asked about the same incident repeatedly, the witness must have felt that she was omitting something, and sought to supply it. Notwithstanding this inference, as noted above, I found that Teresa Bazaldua's testimony was essentially consistent and credible.

106. Ricardo Bazaldua did not mention the Union but did say that Camacho would be reported to "Forty Acres," the term used synonymously with the Union office. I similarly find this distinction to be insignificant.

that a direct threat, ("I'm going to kill you, you son-of-a-bitch") was made by Catalina. Her statement to the effect that she and her husband would not let the situation go unremedied, rather than a "threat" per se, constituted a permissible response to what she perceived as unfair treatment. The act of a large group of workers leaving the work site following Gilberto's arrest was plainly in furtherance of a demonstration of support for Catalina as she attempted to remedy her husband's plight.

[F]lagrant conduct of an employee, even though occurring in the course of section 7 activity, may justify disciplinary action on the part of the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the Act. The employees right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect. . . . N.L.R.B. v. Thor Power Tool Company (7th Cir. 1965) 351 F.2d 584, 587; see also Golden Valley Farming (1980) 8 ALRB No. 8.

Thus, a certain degree of latitude is permitted in the behavior of employees when they act in response to job-related complaints, particularly when that behavior consists primarily in verbal conduct.

Section 1152 of the Act grants to agricultural employees the right to "self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Pursuant to that end, this Board has recognized that employees are to be assured the right to present grievances on matters affecting the terms and conditions of their employment, and to act concertedly in furtherance of this goal, without being discharged or otherwise disciplined for doing so. While mere "gripping" about a condition of employment is not

protected, "when the 'gripping' coalesces with expression inclined to produce group or representative action, the statute protects the activity." Jack Brothers & McBurney (1980) 6 ALRB No. 12; see also J.R. Norton (1982) 8 ALRB No. 89.

As this Board has noted in Gianinni & Del Charro (1980) 6 ALRB No. 38:

When an employee comes to the aid of another worker involved in a dispute with a supervisor which arises out of the employment relationship, this act constitutes protected concerted activity [citations] The law allows employees leeway in presenting grievances over matters relating to their working conditions. Such activity loses its mantle of protection only in flagrant cases in which the misconduct is so violent or of such a serious nature as to render the employee unfit for further service, [citations] As long as the character of the conduct is not indefensible in the context of the grievance involved, the activity remains protected. [Citation]

In that case, not unlike the instant one, the discriminatee's "conduct during [his] protest -- engaging in a short, heated argument provoked by the supervisor's actions -- was not so egregious as to warrant depriving him of the Act's protection."^{107/}

In the recent Dupont case before the National Board (263 NLRB No. 15 (1982)), a foreman engaged in a program of harassment directed at a union activist which culminated in an exchange of remarks. The exchange was punctuated by the employee's pushing the foreman, and the worker's words that if the foreman were not such an old man, he would "stomp his goddamn ass." The NLRB found that owing to the provocation, the employee's conduct was not so

107. Absent from this case was evidence that "the argument became more heated and insults and obscenities were exchanged," as was the situation in Giannini.

unreasonable as to warrant his termination. The discharge, ostensibly for "insubordination," was determined to be violative of the Act.

I find that the statements of Catalina Baez, made in the context of her protesting the treatment accorded her husband, and seeking to enlist the support of her fellow crew members, quite clearly did not constitute a "threat" to the foreman, and were not "so egregious" to warrant depriving [her] of the Act's protection." The discharge, based on her statements, was motivated by an intent to discourage concerted presentation of grievances regarding her husband's work status, and inquiries directed to the foreman on this issue. It was further motivated by her prior participation, along with that of her husband, in Union activities.

It is therefore recommended that respondent's violations of sections 1153(a) and (c) of the Act be found as a result of the discharges of Gilberto and Catalina Baez.

7. Paragraph 13; Discharge of the Armington Crew

General Counsel alleged that respondent discharged foreman Bob Armington and his crew because of their pro-Union attitudes. It is recommended that this allegation be dismissed because respondent, through evidence which was not substantially refuted/ demonstrated that the crew, which had been hired primarily to perform a specific task, was laid off when that purpose was accomplished, and that they were not needed for the work which arose in the subsequent, or harvest, season.

The Armington crew worked from April 20 through June 9. Armington had worked for the company in years past, from 1947 to 1965.^{108/} In the spring of 1981, Armington asked George Lucas, Sr. and George Lucas, Jr. about possible employment, and was hired when respondent, through George Lucas, Jr. and Ray Major, concluded that his assistance would be needed.

Central to General Counsel's argument that the crew was discriminatorily "discharged" was the assertion that respondent promised the crew "permanent" employment. A thorough analysis of all the pertinent testimony on this issue reveals that while this notion may well have been Armington's impression of the situation, no one in the respondent's hierarchy^{109/}

108. General Counsel, as will be discussed below, sought to create the impression that Armington's relationship with the Union in 1965 had an impact on his tenure in 1981.

109. Certain workers stated that supervisor Becerra, at various times after the season had begun, told them they had "steady work." These remarks are discussed infra.

conveyed to him or his workers that they would work for the company permanently in each of its three seasons.

Members of the Armington crew^{110/} all testified^{111/} that on their first day of employment with respondent, they were told by Armington words to the effect that if they did a good job, they would have "steady work." The workers stated that Armington also made this remark on several other occasions during the course of their tenure.

Armington testified that he repeatedly told workers that if they did a good job they would "work steady." The foreman claimed that Becerra told him this when he first contacted him about working for the respondent.^{112/} However, Becerra denied that he contacted Armington at all about the job. Rather, it was Rolando DiRamos who telephoned Armington and told him to report with a crew. DiRamos had been ordered to do so by ranch superintendent Ray Major. While I did not find Becerra to be an especially credible witness,^{113/}

110. These employees included Ronald Diaz, Mateo Gonzalez, and Tomas Medina.

111. Another worker, Jose Carrillo, initially testified that supervisor Jose Becerra made the comment on the first day that the crew would have "steady work." However, no other witness corroborated this assertion, and Carrillo himself, on cross-examination, denied that Becerra addressed the crew on that first day. Becerra himself stated that the first day he merely told the crew, or rather demonstrated for them, how he wanted the work done.

112. Interestingly, in his initial testimony about the conversation, Armington neglected to mention this detail.

113. Becerra's testimony too often contained uncorroborated assertions which were rebutted by numerous other witnesses. For example, he testified that he perceived a problem developing in the Armington crew because certain workers were using "pillows" to kneel on, contrary to his wishes, while they performed their work. Many workers stated that this had never been the case.

both Major and DiRamos provided mutually corroborative versions of this particular. Accordingly, I credit the assertion that DiRamos, rather than Becerra, hired Armington,^{114/} and concomitantly that no representations were made to Armington at that time as to how long he and his crew might expect to work.

Armington himself provided the most plausible explanation for his statements that the crew would have "steady work." He stated that he told the workers "if you do a good job, maybe we'll, I know we'll work steady here, because I know the company and he wants me ... That's what I figure ..." In other words, the assurance of "steady work" was, in one sense, Armington's personal assessment of the situation, not anything he had been promised directly. Further, Armington testified that he made such remarks because "that's common to every supervisor or grower. That's very common. I been in the field for a long time and that's very common. That is the way they have to treat you or they have to respect you ..." Thus, Armington's exhortations were designed to encourage reasonable attitudes and performance from his workers, and should not be perceived as an iron-clad commitment from the respondent that, absent other factors, the crew would have a continual source of employment.

Testimony of workers that they heard Becerra make such remarks is likewise construed in this light. Either they were attributing to him statements made repeatedly by Armington, or if it

114. Armington himself did not impress me as a witness lacking in candor. Rather, being an elderly gentleman, he appeared to be somewhat unable to recollect events with exactitude.

was Becerra who in fact made the comments, it is inferred that he meant to do little more than cajole them to adequately execute their assigned tasks.^{115/}

During the course of its tenure, the crew demonstrated support for the Union principally by wearing Union buttons on the day of the election. Crew member Medina, as well as Armington, noted that most, if not all, the members of the crew did so. Some members of the crew continued to wear the buttons after the election until the date of the layoff. Armington himself was known by respondent to be a supporter of the Union. Major admitted as much. In 1965, Armington had joined the workers on the Union's picket line. It is therefore concluded that respondent was aware that there was a modicum of support for the Union in the Armington crew, and that Armington himself shared the pro-Union view.^{116/}

115. The statement is susceptible of another interpretation. Under respondent's "seniority" system, workers previously employed by the company would have preference for jobs over those who had never worked there before. The allusion to "steady work" might thus have been one to employment opportunities in general which might arise with the company in the future, as opposed to those in conjunction with the continued use of a work force under Argmington. As will be discussed below, several members of the Armington crew were hired to work in other crews in subsequent seasons.

116. DiRamos claimed not to have seen the buttons worn by the crew on the day of the election, but also testified that a lot of workers were wearing buttons that day. Additionally, on the day of the election, Joe Becerra and George Lucas, Jr. visited the crew in the fields, and were in a position to notice the buttons. They were not asked to refute this assertion.

Employee Mateo Gonzalez testified that he revealed to Jose Becerra on the day before the election that the crew was pro-Union. Becerra denied being told anything to that effect. Given the numerous internal inconsistencies in Gonzalez' testimony, I am

(Footnote continued—)

(Footnote 116 continued---)

constrained to attach little credence to it, and do not utilize it as a basis for the finding above.

Gonzalez was chosen by Becerra to be an observer on behalf of the company for the election. On the day prior to the election itself, Becerra took Gonzalez out of the crew and drove him to a meeting for the observers at the company offices. Gonzalez stated initially that on the drive over to the meeting site, Becerra inquired what the worker had heard regarding the Union. Gonzalez at first said that he responded that "it seems as if all were with the Union." Under cross-examination, however, Gonzalez' answer to Becerra contrasted sharply with that supplied by him on direct: "'Well, the way I see things looking like this, I see almost all and nothing for the Union.' I wanted to tell him then, but I didn't have the courage." Gonzalez, almost immediately thereafter modified his statement by saying that he told Becerra, "I don't know. I see almost nothing but those for the Union."

During the course of the meeting itself, it became known that Gonzalez had been named by both the Union and the company as an observer. This revelation caused no small amount of consternation on Gonzalez' part. As he and Becerra rode away from the meeting, the worker claimed that his experience had made him more bold: in his words, "That's when I sang. That's when I told him I belonged to the Union. ... I said 'Joe, I see that everybody, all the people, are with the Union, and Armington included."

Nevertheless, the depth of Gonzalez' commitment was not so overbearing as to insure his vote at the election: he chose to absent himself that day.

A further ground exists for discounting the impact and probative value of Gonzalez' remarks about support for the Union in the crew. Apart from the self-serving and conclusionary nature of the statements, they are, quite clearly, hearsay and hence inadmissible to prove the truth of the matters asserted therein. (Evidence Code Section 1200; see also Jefferson, California Evidence Benchbook, 2d Ed., section 1.1, pp. 3-5 (1982).) While admissible for the purpose of proving that the statement was made (see Jefferson, op. cit., section 1.6, pp. 76, 77), Gonzalez' remarks cannot provide a basis for concluding that the crew, in fact, engaged in Union activities or supported the Union. Uncorroborated hearsay has been held insufficient to support a finding (Patterson Farms (1976) 2 ALRB No. 59; C. Mondavi & Sons (1977) 3 ALRB No. 65. The act of wearing Union buttons on the day following the statement would not provide this corroboration. No evidence was presented of any prior or contemporaneous acts which would supply this necessary element.

Notwithstanding the characterization by General Counsel that the "discharge" of the crew was accomplished by respondent with a view toward ridding itself of a "pro-UFW crew, chill union activities and undermine and handicap the UFW in its functions as a labor organization," no manifestations of Union support emanating from the crew or its foreman, other than those outlined above, appeared in the record. The crew did not, as did other crews, have a Union representative or organizer within its ranks. Rather, authorization cards were distributed and collected by Petra Fuentes, a member of the Camacho crew, who maintained that she got no help from those working for Armington.

On June 9, Becerra arrived where the crew was working and told Armington that the crew was being "stopped," or laid off. Although Becerra stated that he made that announcement near quitting time, several of the workers, whom I credit, testified that he did so in the early afternoon, about 1:30 p.m. They also noted that when called out of the field to hear the announcement, the crew had not finished the particular rows in which they were working. Employees Diaz, Gonzalez, Medina and Godinez all testified that Becerra announced to them on the last day that he was stopping the crew, that they would be called back in two to three weeks, that they should "check with Bob." Worker Carrillo testified that Becerra spoke in a more qualified fashion. After telling the workers it was their last day, Becerra said: "If the company were to need us again he would call us right away for the picking," and that "the company was going to call us possibly when they began

picking, one week or two weeks^{117/} later."

Bob Armington testified that Becerra told him to "tell the people that we'll stop for a while." He stated that he informed his workers that they were "laid off for a while. . . . we'll wait and we'll have a steady job." In his testimony, Armington added: "I think that's what I understand and so I told the people."

Becerra presented the following version. On the last day, he thanked the crew for its work, and told them there was no more. One of the crew members asked how long they would be stopped, or when they would be called back. Becerra responded that it could be for one day, one week, one month, "or never."^{118/}

The most salient aspect of all of the testimony regarding what the members of the Armington crew were told on that last day is the impression that was created among them that they would soon be recalled to work for the respondent. Under the circumstances, such an impression was wholly justifiable. A number of workers, acting on the belief that they would be recalled, checked with Armington several weeks later, only to be told by him that he had not received an order telling him to return to work with his crew. As subsequent events bore out, Armington was never to receive such an order, and hence General Counsel's allegation that he and his crew were "discharged."

117. The harvest would not actually begin until about a month and a half later.

118. General Counsel took great pains to demonstrate, via testimony from those present, that none of the workers heard Becerra say they would "never" be recalled. I credit their testimony in this regard. This provides yet another illustration of Becerra's lack of candor.

The fact that the crew was told that it was going to be laid off only to find out later that its members were not to be rehired as a crew^{119/} is a circumstance giving rise to the suspicion that the tenure of the crew was affected by unlawful discriminatory considerations. This is particularly so when viewed in the context of the Union election in the week prior to the layoff, and the margin of victory which may have been reached, in part, with the votes from the members of the Armington crew. However, a suspicion, in and of itself, is insufficient to establish a violation. (See Rod McLellan Co. (1977) 3 ALRB No. 71; Tex-Cal Land Management, Inc. (1979) 5 ALRB No. 29.) Neither Major nor DiRamos told Armington that he might expect continued employment with respondent. Even Becerra's remarks on the last day of work for the crew were sufficiently ambiguous as to not indicate a definite commitment by respondent to employ the crew through a series of seasons.

Respondent asserted that it decided to retain a crew under Armington's supervision to assist primarily in the training of young vines at its Merced Ranch. General Counsel argues that rather than hiring the crew for a specific purpose and laying them off when the purpose was accomplished, the crew was utilized to perform a broader range of tasks. However, while it was true the crew may have been employed sporadically in other capacities,^{120/} these tasks were

119. A total of nine employees from the crew were hired to work in ensuing seasons.

120. Employees Diaz and Gonzalez stated that they worked, in addition to training vines, planting vines, moving hoses, tipping, deleafing, hoeing and taking out grass. Some of these tasks were performed at the M & L Ducor Ranch on the day of the election where the crew was placed so as to be near the polling site.

merely an adjunct to their principal function. In Armington's words, "... they might be using shovels or they might be using a hoe, because we are the only crew that was working in the Merced area."

When the work at the Merced Ranch had been nearly completed, Major decided to lay off the crew. As he stated, the crew "caught up with the job." General Counsel contends that the crew was stopped in the middle of the work day before the rows in which individuals were working and the block as a whole were finished; that this fact indicates that the assigned job had not been completed; and that respondent's representations to that effect are indicative of a pretextual motive. However, respondent adduced testimony that the training work which remained at Merced was minimal, and an entire crew was not required to finish it. This testimony was not substantially controverted.

General Counsel points to the fact that the crew was not given any advance notification of the layoff. He contends that the "timing and abruptness of the discharge confirms the discriminatory nature of the decision" However, no evidence was presented that respondent announced in advance an impending layoff to any crew. Thus, the announcement to the Armington crew could hardly be viewed as "precipitous" when seen in the light of treatment of other employees' tenure under like circumstances.

Major, as the individual who made the actual decision to lay off the crew, was able to adequately counter any assertions regarding the abruptness of the layoff by explaining that all the crews that were working were laid off around that time. Previously,

charges had been filed with the Board regarding the assertion that the recently-hired Armington crew was retained while other, more "senior" crews, were laid off. Sensitized or perhaps wary of such considerations, Major concluded that it would be best to lay off the Armington crew with the remainder of the other crews.

Major similarly provided convincing reasons why the crew was not recalled for the harvest. In testimony which was not controverted, Major characterized the yield from the 1981 harvest as the worst it had been during his twenty-five years with the company. Despite an increase from the prior year in the acreage over which it worked, respondent harvested 100,000 fewer boxes of grapes. Crew complements were also reduced: while in typical years the harvest crews would contain around sixty employees, in 1981, no crew had greater than fifty working at one time. In anticipation of the reduced harvest, Major foresaw that there would be no need, or, in fact, no work for the Armington crew, once his regular crews were retained.^{121/} It is this "business justification" which satisfactorily counters any inference of discrimination, and which provides that central rationale for dismissing the allegation regarding the Armington crew.^{112/}

121. In further support of this notion is the fact that no "new" crew was added to the eleven which customarily worked in the harvest.

122. General Counsel argues that respondent failed to provide documentary evidence of its reduced output, and that therefore, under Evidence Code section 412, Major's assertions should be viewed with distrust. However, Major, as overall superintendent of respondent's operations, was clearly in a position to evaluate the results of the 1981 harvest. Should General Counsel take issue with that assessment, it became incumbent upon him to refute it via documents etc. In fact, at one point in the course of his examination, Major challenged General Counsel to look at respondent's production records.

Further, evidence demonstrated that nine members of the Armington crew were hired to work in subsequent seasons. Although the crew, as a whole, was not retained, the reemployment of a significant number of its members (about one-third) militates against a finding of an all-pervasive discriminatory scheme with the crew as its object.

It is therefore recommended that this allegation be dismissed.^{123/}

123. Armington's discharge itself, in order to be proscribed by the Act, must fall within the criteria established by this Board in *Ruline Nursery* (1981) 7 ALRB No. 21. There the Board recognized that "the protections afforded to agricultural employees are not extended to supervisors. ... [A] supervisor generally serves at the will of the employer and may therefore be discharged at any time and for any reason (or for no reason at all), for 'the hiring, discharging, and conditions of employment of supervisory personnel are strictly the prerogative of management.'" [citing *N.L.R.B. v. Ford Radio and Mica Corp.*, (2d Cir. 1950) 258 F.2d at 457.]

As a supervisor, therefore, Armington's tenure was subject to a broad range of managerial discretion. His discharge would not run afoul of the Act unless: he was discharged for having refused to engage in activities proscribed by the Act, i.e., unfair labor practices; the discharge was for having engaged in conduct designed to protect employee rights, such as giving testimony adverse to the employer in a Board proceeding; or the discharge was "the means by which the employer unlawfully discriminates against its employees," such as, "when employees' tenure is expressly conditioned on the continued employment of their supervisor, employees have engaged in protected concerted activities, and their supervisor has been discharged as a means of terminating the employees because of their concerted activity. [Citing cases.]" (*Id.* at pp. 9-11.)

A fourth limitation on managerial prerogative to discharge supervisors was expressly not adopted by the Board, which noted that the cases promulgating the exception "have been characterized by vigorous dissents and seemingly inconsistent holdings." That rule "... appears to be ... when the supervisor's discharge is effected along with the unlawful discharge of unit employees or other widespread employer misconduct, the discharge is aimed at employees who have engaged in union activities and the employer has

(Footnote continued—)

(Footnote 123 continued—)

created such a pervasive atmosphere of coercion that employees cannot reasonably be expected to perceive the distinction between the employer's right to discharge its supervisor for certain conduct, and the employees' right to engage in the same activities freely without fear of retaliation. [citing cases]" (Id., p. 12.)

No evidence was presented that would enable the case to fall within the first two exceptions. Regarding the third and fourth, as I have concluded that the crew was not terminated because of its having engaged in protected concerted activities, Armington could not have been discharged for that reason. Further, in referring to the entirety of this decision, no proof exists of "widespread employer misconduct" or a "pervasive atmosphere of coercion."

Notably, the National Labor Relations Board has recently overruled that line of cases recognizing this so-called "fourth" or "pattern of conduct" exception, and applies a narrower standard governing supervisor discharges. "The discharge of supervisors is unlawful when it interferes with the rights of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employer's interests or when they refuse to commit unfair labor practices." Additionally, that Board continued to recognize the "third" exception where a supervisor's discharge is necessary to effectuate the discharge of employees. Parker Robb Chevrolet (1982) 262 NLRB No. 58.

8. Paragraph 15; Refusal to Re-hire Jose Ramirez Mora

General Counsel alleged that Jose Ramirez Mora was refused rehire for respondent's 1981-82 pruning season because of his "support for and activities on behalf of" the Union. This allegation must be dismissed for what may broadly be termed as a failure of proof of any of the particulars contained in the allegation. Specifically, the evidence showed that Mora was not, strictly speaking, "refused rehire"; nor did he directly participate in Union activities to the extent that the respondent could have acquired knowledge of that participation, and thus discriminated against him for that reason.

Although Mora testified that he wore a Union button to work during the period of the election campaign, he was unable to state with any specificity the number of such occasions, or present any evidence which might give rise to the inference that his foreman, "Lalo" Cardenas, was in a position to observe Mora's wearing of the button.^{124/} Further, Mora admitted that a majority of his fellow crew members also wore Union buttons, thus making such an act on his part unremarkable.

While General Counsel does not, in his brief, specifically address the issue of Mora's Union activities and the company's knowledge thereof, the focus of his proof at the hearing seemed to stress the Union activities of Mora's son, Gonzalo Ramirez. It appeared that General Counsel wished to create the inference that respondent discriminated against Mora because his son was an active

124. Mora did say that when he was wearing the button and the foreman approached "he wouldn't tell me anything."

and visible Union adherent. Ramirez not only regularly drove his father to work in 1981, but also obtained employment for his father in the year previous and in the 1981-82 pruning season by asking supervisors if there were any openings. Thus, the association between the two was made clear.

Ramirez professed to be a Union sympathizer who wore Union buttons to work, put Union bumper stickers on employees' cars, and attended Union meetings. Prior to the election, he distributed authorization cards, and helped workers to fill them out. His father assisted him in these tasks. However, Ramirez admitted that the card distribution took place at workers' homes away from the work site, in towns like Earlimart. Thus, it was not affirmatively established that these activities were noticed by respondent's foremen or supervisors.

Around the 12th of December, Ramirez began repeatedly asking DiRamos for work for his father.^{125/} Ramirez noticed that during this period about fifteen employees had already begun to work in Cardenas' crew. DiRamos, according to Ramirez, told him his father had to wait until Cardenas himself returned from Mexico before he could go to work.^{126/}

Cardenas actually arrived about the 22nd of December. When Mora called the foreman and asked him when he was going to work,

125. The record is unclear whether Mora was in the vicinity at that time, or was still in Mexico (see below).

126. The crew started under DiRamos' supervision prior to Cardenas' return.

Cardenas responded that he should see DiRamos. The father became somewhat incensed, telling Cardenas that he was told by DiRamos to speak with the foreman.

Several days thereafter, on about the fifth of January, Ramirez again spoke to DiRamos at the supervisor's home. Ramirez pointed out that he was just being sent back and forth between supervisor and foreman, that his father had been out, not working for many days. Eventually, around the 22nd or 23rd of January, Mora was hired to work in Ramon Hernandez' crew. On or about that date supervisor Joe Becerra admitted to Gonzalo Ramirez that Mora should have been hired a long time ago.^{127/}

On cross-examination Ramirez essentially reiterated all of the particulars that he had testified to on direct: specifically, these concerned each of the incidents where he had requested work for his father. Such reiteration enhanced Ramirez' credibility, although, in actuality, there were few, if any, conflicts in the testimony on this issue. However, Ramirez also admitted that his father had not worked in the picking season all the way to its end, but had finished or stopped two days before the season was actually over.

127. Becerra testified that in December Gonzalo continually asked him for work for his father. Becerra stated that he told Gonzalo that he did not know when he would be able to employ the father because the crew was already full. During the course of one such conversation, Becerra told Gonzalo that his father had reported to work late, but that he would see if he could place him with someone other than Cardenas. Subsequently, Becerra found out that foreman Ramon Solano Hernandez needed people. When he then informed Mora of the vacancy, Mora insisted upon working in his original or Cardenas' crew. Becerra stated to him that if he wanted to work, he should work with Ramon.

Respondent maintained that the reason Jose Ramirez Mora was not hired in the beginning of the pruning season in 1981-82 was, as admitted by his son, that he did not complete the harvest of 1981 and, according to company rules and policy, was not eligible for preferential hiring for the ensuing or pruning season. Cardenas testified that towards the end of the 1981 picking season, Mora talked to him about going to Mexico. He asked the foreman for advice, telling him that he wished to leave, but that he did not want "problems" when he came back for the pruning. The foreman advised him that if his absence was due to illness, emergency or accident, he could start again with the rest of the crew, but people who left the job on their own would not start to work until later.^{128/}

Towards the latter part of October, 1981, Rolando DiRamos laid the Cardenas crew off for a few days. After the layoff of the crew, the crew itself was disbanded, ceasing to work as a unit, but workers in the crew were sent to other crews to assist in the harvest. Cardenas himself did not work in the picking after the reassignment of the members of his crew. Mora also was not among those individuals who returned to work in the harvest to be so reassigned.

Cardenas went to Mexico on November 25. Before he left, supervisor Jose Becerra asked the foreman to provide him with a list

128. Mora was not asked to refute these assertions and hence they must be credited. Additionally, DiRamos testified that Mora requested his final paycheck for the harvest from him, telling the supervisor he was going to Mexico. DiRamos informed the worker at that time that he was not laid off yet.

of those individuals who had finished the harvest and who knew how to plant runners. Cardenas made up a list which he claimed that he left with a relative. To Cardenas' knowledge, the list was used to call people to begin work in the planting of runners.^{129/} when

Cardenas rejoined the crew after his return from Mexico, the people who were so employed in the beginning of the pruning season^{130/} were those who had been present when the crew was divided and its members reassigned.

Cardenas testified that after he returned from Mexico he had a conversation with Gonzalo Ramirez about Mora's reemployment. Cardenas stated that Ramirez told him at that time that his father had not yet returned from Mexico, but that the worker wanted to know whether his father would be rehired. Cardenas responded that he was not hiring then because he had not received any orders to augment his crew.

Cardenas also spoke to Mora on the telephone on several occasions after Mora returned from Mexico. When asked whether he could hire the worker, the foreman responded that he had hired sufficient people already to fill out the crew, and that those he had hired had finished the harvest season. As it turned out, during the entire pruning season of 1981-82, Cardenas did not hire anyone

129. Planting runners was the first task assigned to the group from Cardenas crew during the 1981-82 "pruning" season.

130. Not all those who presented themselves after the crew was disbanded continued to work in the harvest. Those for whom places did not exist were officially laid off; others who had medical excuses for not finishing the season also were not deprived of employment priority for the pruning.

who had not worked until laid off in the previous harvest.

General Counsel sought to make much of the fact that Cardenas himself had ceased working approximately the 29th of October and that his crew was disbanded.^{131/} Therefore, he argued that Mora worked up until the time that his crew was laid off. However, Cardenas and the company maintained that workers were still obligated to report despite the fact that their crew had been laid off, and that when they did report these workers were assigned to other crews. While Cardenas himself would have no knowledge, since he was not present, whether or not those workers who were reassigned actually completed the harvest, he did know which workers appeared to be reassigned following the layoff of the crew itself. Mora was not in this group, and thus was not considered among those eligible for preferential recall as the pruning season began.

Notwithstanding any of the foregoing, it appears that Mora was actually called back to work at the very inception of the pruning season. Unfortunately, he had not as yet returned from Mexico, and was unable to accept the offer of employment. The fact that Mora was offered a job at that time substantially negates, if not destroys, any inference that his subsequent "refusal" to be re-hired was motivated by unlawful, discriminatory considerations.

Supervisor Becerra testified that sometime in November, 1981 he spoke with Gonzalo Ramirez at Ramirez' house. Becerra informed Ramirez that they company was going to begin pruning its almond trees the following Monday, and that he and his father were

131. The contention was not raised in General Counsel's brief, but was presented orally at the hearing.

to report to work^{132/}. Ramirez then allegedly told Becerra that his father was not there, that he had gone to Mexico, and asked whether he could substitute his brother instead. Becerra replied in the negative, since his brother had not worked for the company before. Ramirez himself did not offer any testimony to controvert Becerra's assertions in this regard, and therefore they must be accepted as factually accurate.

While a seeming contradiction arises between the above account and assertions that Mora did not complete the harvest season and hence was not hired with the group that was initially employed in the Cardenas crew during the 1981-82 pruning season, it appears that, strictly speaking, the company did not "refuse to rehire" Mr. Mora.^{133/} Instead, Jose Becerra did offer Mora employment, but Mora was simply not present and could not accept the job. As with the allegation involving Armando Orozco (supra), it appears that employment was made available to Mora at a time when he was in no position to be able to accept it. This is not to say that the company would not rehire him because of his Union activities, or in the case of Mr. Mora, the Union activities of his son. Respondent made clear its intention to hire Mora. He had a job offer from Becerra, but could not accept it. The subsequent failure to place Mora in the Cardenas crew, while not substantially related to Mora's earlier inability to work for Becerra, cannot, as a consequence, be

132. Mora had worked in this capacity the previous year.

133. Apparently, Becerra and Cardenas were not under the same constraints as to whom they could put to work. Becerra was in charge of the almond tree pruning work.

deemed "discriminatory."

The inference that Respondent was aware of Mora's Union activities can barely be drawn on the basis of the facts presented. The mere, passive act of wearing a Union button, when many such buttons were being worn by workers, does not adequately support an inference that respondent was sufficiently aware of Mora's Union sympathies as to render him an object of anti-Union discrimination, even given the extent of animus towards the Union that respondent had displayed. (Sears-Schumann Company, Inc. (1982) 8 ALRB No. 43; cf. Joe Maggio, Inc. (1978) 4 ALRB No. 37; Mike Yurosek & Sons, Inc. (1982) 8 ALRB No. 37; Matsui Nursery, Inc. (1979) 5 ALRB No. 60.)

It is also noteworthy that Gonzalo Ramirez, who more conspicuously displayed his pro-Union attitudes, was hired as respondent's 1981-82 pruning season began. "Although an employer's discrimination against an employee because he or she has a familial relationship with a Union activist may violate the . . . (Act), the lack of proof that respondent" discriminated against the activist "forecloses a finding that" similar action taken with regard to his/her relatives "was unlawful." A. Caratan (1982) 8 ALRB No. 83, and cases cited therein. While not directly apposite to the instant case,^{134/} the Caratan situation highlights the logical inconsistency between a finding of discrimination against a not-so-visible Union adherent where the more vocal and obvious pro-Union relative has not been the object of discrimination.

134. In that case the activist was transferred for non-discriminatory reasons to a different work site. The members of his family were likewise transferred.

Lastly, as noted in Royal Packing Company (1982) 8 ALRB No. 48, "disparate treatment of similar conduct evidences discriminatory intent." To a lesser extent, the converse is also true. Here, General Counsel made no showing that any worker who had not worked in the harvest until he/she was laid off was accorded preferential hire status for the ensuing pruning season. Thus, Mora's tenure was treated in full conformity to the seniority rules stipulated to by the parties and set forth in the introduction to this decision.

Therefore, it is recommended that this allegation be dismissed.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent, George Lucas & Sons, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee for engaging in union activity or other protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Make whole Juan Juarez, Samuel Viramontes, Gilberto Baez and Catalina Baez for all losses of pay and other economic losses they have suffered as a result of the discharges of these employees, the makewhole amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(b) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this

Order.

(c) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

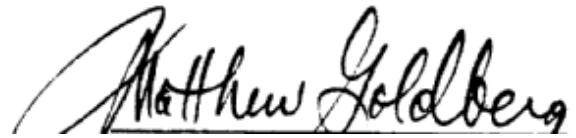
(d) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(e) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice and their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for worktime lost at this reading and the question-and-answer period.

(g) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request

until full compliance is achieved.

DATED: February 25, 1983.

A handwritten signature in cursive script that reads "Matthew Goldberg". The signature is written in black ink and is positioned above a horizontal line.

MATTHEW GOLDBERG
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging and refusing to rehire employees because of their support of the United Farm Workers of America, AFL-CIO, (UFW) or because they engaged in activities for the benefit of employees. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act (Act) is a law that gives you and all other farm workers in California these rights.

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT discharge, refuse to rehire, or otherwise discriminate against any employee because he or she has joined or supported the UFW, or any other labor organization, or has exercised any other rights described above.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

WE WILL reimburse Juan Jimenez, Samuel Viramontes, Gilberto Baez and Catalina Baez for all losses of pay and other economic losses he has sustained as a result of our discriminatory acts against him, plus interest computed in accordance with the Board's Order in this matter.

DATED:

GEORGE LUCAS & SONS

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE